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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-225

BRUCE BABBITT, GOVERNOR OF THE STATE OF ARIZONA, ET AL.,
Defendant Appellants,
AND
ARIZONA FARM BUREAU FEDERATION,
AN ARIZONA CORPORATION, ET AL.,
Intervenor Appellants,
versus
UNITED FARM WORKERS NATIONAL UNION
ON BEHALF OF ITSELF AND ITS MEMBERS, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

OPINION BELOW

The opinion of the district court (App. A, *infra*, at 1-45) is reported at 449 F. Supp. 449.

JURISDICTION

The judgment and order of the three-judge district court, holding unconstitutional in its entirety and enjoining enforcement of the Arizona Agricultural Employment Relations Act, Ariz. Rev. Stat. Ann. § § 23-1381 through 23-1395 (Supp. 1970), was entered on

April 20, 1978 (App. B, *infra*, at 1-2). A notice of appeal to this Court was filed on June 13, 1978 (App. C, *infra*, at 1-3). Jurisdiction is conferred on this Court by 28 U.S.C. § 1253 (1970).

QUESTIONS PRESENTED

1. Whether an Article III case or controversy is presented by a lawsuit challenging in its entirety a comprehensive agricultural labor regulatory statute, where the lawsuit was filed prior to the appointment of the Agricultural Employment Relations Board and prior to adoption of any regulations; where not one of the five statutory provisions held constitutionally defective has ever been applied to any of the plaintiffs; and where the record consists almost entirely of widely differing speculation concerning how the statute might be applied.

2. Most of the district court's constitutional rulings depend upon its interpretations of the state statute that it invalidated. In each instance, the court chose the interpretation that raised, rather than avoided, the constitutional questions. The second question presented is whether under these circumstances the district court had an obligation either to abstain or to adopt that version of state law that would save the statute rather than invalidate it.

3. Whether the election procedures provided by Arizona's Agricultural Employment Relations Act can be held to violate the right of freedom of assembly, on the basis of assumed but unproven delays in holding elections, where the challenged procedures are virtually identical to those of the National Labor Relations Act (NLRA), and where the asserted reason for the significance of delay — peak employment seasons of short

duration — is equally applicable to an important segment of NLRA coverage.

4. Whether a state labor statute's extension of the proviso in § 8(b)(4)(ii)(B) of the NLRA, which permits truthful secondary consumer pressures, to a prohibition against untruthful, dishonest and deceptive secondary consumer pressures renders it unconstitutional.

5. Whether under this Court's holdings in *NLRB v. Babcock and Wilcox Co.*, 351 U.S. 105 (1956), *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972), and others, federal courts are to determine issues of union access to employers' property by taking into account all relevant considerations, including the availability of other means of communication, or whether the issue may be decided without regard to the facts of the particular case.

6. Whether for the first time in history the Seventh Amendment should be held binding on the states, and if so, whether compulsory arbitration in the narrow circumstances of Section 1393 B of the Arizona Agricultural Employment Relations Act violates the Seventh Amendment or substantive due process.

7. Whether the district court's determination that all or parts of four out of fifteen sections of Arizona's Agricultural Employment Relations Act (and one out of twenty unfair labor practices) were unconstitutional, justified its invalidation of the entire Act, when most of the remaining provisions are functionally separate and independent.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Seventh Amendments and the Due Process Clause of the Fourteenth Amendment to the United States Constitution provide in pertinent part:

> *First Amendment.* Congress shall make no law . . . abridging the freedom of speech . . . or of the right of the people peaceably to assemble . . . .
>
> *Seventh Amendment.* In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.
>
> *Fourteenth Amendment.* No State shall . . . deprive any person of life, liberty, or property, without due process of law.

The full text of Arizona's Agricultural Employment Relations Act is set forth at App. D, *infra*, at 1-36.

STATEMENT OF THE CASE

The National Labor Relations Act excludes agricultural laborers from its coverage.[1] During its 1971 session, the Arizona Legislature first attempted to deal with the serious problems resulting from the absence of a labor law protecting an important segment of the State's work force. Because there was no governmentally controlled and supervised procedure for workers to choose their bargaining representative, representation questions were settled as a matter of economic might, rather than free choice. The Legislature was unable to provide a solution in 1971.

[1] Section 2 (3), 29 U.S.C. § 152 (3) (1970).

In May of 1972, following extensive hearings and debates in which the views of all interested parties were considered, the Legislature enacted the Agricultural Employment Relations Act (AERA). It is a comprehensive labor statute, modeled after the NLRA in its overall structure and operation, but tailored in many respects to the peculiar conditions of agricultural labor. The Act defines persons and activities subject to its coverage,[2] specifies and prohibits unfair labor practices by employers[3] and unions,[4] and defines the obligation of each to engage in collective bargaining.[5] It provides procedures for secret ballot elections virtually identical to those of the NLRA.[6] It also establishes an agricultural employment relations board (Board),[7] and gives it power to hold hearings,[8] conduct elections and certify the results,[9] issue cease and desist orders,[10] order reinstatement and back pay,[11] supervise elections,[12] prohibit unfair labor practices,[13] and generally to implement the statute.

[2] Ariz. Rev. Stat. Ann. § 23-1382 (Supp. 1977).

[3] *Id.* at § 23-1385 A.

[4] *Id.* at § 23-1385 B.

[5] *Id.* at § 23-1385 D and E.

[6] *Id.* at § 23-1389.

[7] *Id.* at § 23-1386.

[8] *Id.* at § 23-1387 C and § 23-1390.

[9] *Id.*

[10] *Id.* at § 23-1390 C.

[11] *Id.*

[12] *Id.* at § 23-1389.

[13] *Id.* at § 23-1390.

The complaint in this case,[14] challenging the statute on numerous constitutional grounds, was filed about three months after the statute had been signed into law. At that time, there were no regulations, the Board had not been appointed, and there had been no enforcement of the law. Subsequently, the Board was appointed, regulations were adopted, and there has been some enforcement. Just prior to the trial of this case, in January of 1977, the parties entered into a Stipulated Statement of Status of Past and Pending Actions Taken in Accordance with the Agricultural Employment Relations Act (enforcement stipulation) describing the twenty instances in which there had

[14] The lower court's opinion describes the parties: "Plaintiffs in this action are the United Farm Workers National Union (U.F.W.), on behalf of itself and its members; Gustavo Gutierrez, an agent of the U.F.W. in the State of Arizona; Ruben Alaniz and Matilda Varela, farm workers, on behalf of themselves and all other farm workers; and Wendy Rose, an individual supporter of the U.F.W., on behalf of herself and all other similarly situated U.F.W. supporters.

Defendants are Bruce Babbitt, Governor of the State of Arizona; Jack La Sotta, [sic] Acting Attorney General; Bert [sic] Fleming, Treasurer; Raymond Long, Finance Commissioner; Gene Blake, William S. Boice, Jack Montgomery, Keith Walton, Jack McManus, Milton G. Sanders, individually and as members of the Arizona Agricultural Relations Board; and Theresa Bond, in her capacity as Executive Secretary of the Board." App. A at 2.

In addition, the Arizona Farm Bureau Federation, an Arizona corporation, the Arizona Grape Growers' Association, an Arizona corporation, the Vegetable Growers' Association, an Arizona corporation, and the Yuma Citrus Shippers' Association, an unincorporated association, were permitted to intervene as defendants. *Id.*

The district court did not determine this case to be a class action.

been some kind of enforcement of the Act. None of those twenty is involved in this litigation. Moreover, as described more fully below, none of them involved application to any of these plaintiffs of any statutory provision held unconstitutional by the district court.

The trial was held before a three-judge district court. Most of the evidence presented at the trial consisted of the expression of views concerning some results that might be expected under certain provisions of the Act if and when they were actually applied.[15] This testimony necessarily rested on two assumptions:

> 1. The interpretation that the Arizona courts would place on several key provisions whose meaning was, and still is, in dispute.[16]
>
> 2. The effect of those provisions — once interpreted by the Arizona courts and applied by the Board — on agricultural employment conditions and relationships in Arizona.[17]

[15] The witnesses were Mr. Cesar Chavez, President of the Plaintiff United Farm Workers Union, two labor lawyers, one offered by each side, an agricultural field supervisor, and an agricultural economist.

[16] Concerning access to the employer's property, for example, one of the issues on this appeal, Mr. Chavez acknowledged that "whether it [access] is denied or not is a matter of legal interpretation." Reporter's Transcript (Tr.) 182. Mr. Chavez repeatedly stated that adverse effects from the statute were based on assumptions concerning how it would be interpreted. See, *e.g.*, Tr. 162-63, 164, 182-84, 211.

[17] Some of Mr. Chavez' views were based on interpretations of the law given by his attorneys. See, *e.g.*, Tr. 259. Referring to a particular provision dealing with management rights Mr. Chavez stated: "I don't know what it means but if it means what I think it to mean, then it would have a very bad effect on the Union." Tr. 182.

It is not surprising that the "expert opinions" built on such a combination of speculations varied greatly. Regarding the question considered most important by the district court — the minimum time that would expire between the filing of the election petition and the holding of an election — the defendant's "expert" concluded that the period could be as short as eight days. "Experts" for the plaintiffs concluded that it would be much longer.

The plaintiffs attempted to blunt the obvious case or controversy problems resulting from their attempt to have a federal court pass on the constitutionality of statutory provisions in the absence of actual application of any of these provisions in the action before the court, by pointing to the enforcement stipulation. The twenty cases covered by that stipulation fall into three categories:

1. Eight of the cases, numbers 1, 2, 3, 7, 11, 12, 13, and 20 were attempts to prevent allegedly illegal secondary boycotts. The defendant, or the party charged, in each of these cases was the appelle U.F.W. However, none of the cases involved the interpretation or enforcement of § 1385 B 8, [18] the only secondary boycott provision of the Act held unconstitutional by the district court.

2. Six of the cases, numbers 4, 5, 6, 8, 9, and 10, involved election procedures. None of the plaintiffs in this case was involved in any of those elections. In none of the six cases was there an assertion that delay created any problems.

[18] This provision deals with secondary consumer pressures "by the use of dishonest, untruthful and deceptive publicity."

3. The remaining six cases, numbers 14, 15, 16, 17, 18, and 19, all involved unfair labor practice proceedings against employers under § 1385 A.

Thus, of the five statutory provisions found constitutionally defective by the lower court (discussed below) the only one involved in any of the enforcement proceedings was § 1389, which deals with elections.[19] Not one of these plaintiffs was involved in any way in any of those elections or any other election under the statute that they challenge. In none of the six election cases covered by the stipulation was there any allegation of unfairness because of delays.

Before the district court, the appellees' principal emphasis with regard to the enforcement stipulation was that in three of the secondary boycott cases, temporary restraining orders had been issued against them without notice or hearing. The district court did not deal with the constitutional sufficiency of any of these *ex parte* temporary restraining orders. Moreover, the notice requirements for a temporary restraining order depend on the facts of the particular case. *Carroll v. President and Commissioners of Princess Anne County*, 393 U.S. 175 (1968). If there are constitutional defects in any temporary restraining order proceedings under the Act, the challenge should be raised in those proceedings.

[19] In case number 2, the Safeway boycott case, Safeway alleged violation of the provision dealing with dishonest, untruthful and deceptive publicity (Ariz. Rev. Stat. Ann. § 23-1385 B 8 (Supp. 1977)), but that part of the statute was neither interpreted nor enforced in that case. The only reference to it was the Arizona trial court's statement, "The Court concludes that the Union's publicity is a sufficient compliance with Subsection 8." (Enforcement Stipulation, Exhibit 2A, at 7).

Totally lacking from this case, therefore, is the Article III requirement that questions come into federal court only after they have been sharpened by actual disputes between the parties to the litigation.

By the time the briefs were filed following the trial, the plaintiffs had reduced to nine their challenges to various parts of the Act.[20] The Court held three parts of the statute unconstitutional on their face, and invalidated two others in light of testimony at the trial concerning how the Act might function. Most of the court's holdings also rested on assumptions as to how the Arizona courts might interpret the relevant provisions. The sections held invalid on their face were:

1. Section 1385 B 8, prohibiting secondary consumer pressures "by the use of dishonest, untruthful and deceptive publicity."

2. Section 1392, which provides criminal penalties for violations of the Act.

[20] In the words of the district court: "In particular, plaintiffs' agruments deal with nine separate issues and at least as many provisions of the AERA in support of their contention that the AERA is unconstitutional. Those issues and the statutory provisions dealt with are: (1) A.R.S. § 23-1385(B)(6) and (7) [generally dealing with secondary boycotts as an unfair labor practice]; (2) A.R.S. § 23-1385(B)(8) [publicity directed at the ultimate consumer regarding nonuse of agricultural product as an unfair labor practice]; (3) A.R.S. § 23-1385(B)(12) [recognitional picketing as an unfair labor practice]; (4) A.R.S. § 23-1389 [employee representation and election procedures]; (5) A.R.S. § 23-1385(C) [access by union to workers on employer property]; (6) A.R.S. § 23-1382 (1) [exclusion of stitchers and haulers and others from AERA]; (7) A.R.S. §§ 23-1384, 23-1385(B)(11), 23-1385(D) [elimination of "management rights" from bargaining process]; (8) A.R.S. §§ 23-1385(B)(13), 23-1393(B) [restriction and prohibition against striking and picketing]; and finally, (9) A.R.S. § 23-1392 [criminal penalties for violation of the Act]." App. A at 3.

3. Section 1393 B, requiring that any employer who seeks a ten-day restraining order against a strike during harvest must, as a condition, agree to submit the dispute to binding arbitration.

The provisions held unconstitutional in light of the evidence were:

1. That part of Section 1385 C which provides that neither an employer nor a labor organization shall be required to make available to the other "materials, information, time or facilities" for the purpose of communicating with employees.

2. All of Section 1389, dealing with representation and elections.

Judge Craig wrote a separate opinion styled a concurrence, taking the position that the court should have abstained, "in order that the Supreme Court of Arizona might first express its opinion with respect to the constitutionality of a law established by the Arizona State Legislature." (App. A at 45).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

1. *The Present Dispute Is not a Case or Controversy, and the District Court Should Have Dismissed It.*

Central to Article III's case or controversy requirement is the well-established principle that federal courts have jurisdiction to decide only those issues

that are necessary to the resolution of actual, concrete controversies.[21]

That principle was not followed by the district court. This case is wholly hypothetical. There are no specific pertinent facts, no application of provisions of the statute to these plaintiffs, no specific farm worker pointing to facts on the record demonstrating how his constitutional rights have been affected by the application of the statute to those specific facts.

The "record" consists almost entirely of widely varying expressions of opinion concerning what kinds of results might be expected from application of different provisions of the statute. It is not surprising that the views of the experts varied. The main evidentiary issue at the trial, and the most important factual element in the lower court's decision, concerned how long it might take to hold elections under the Arizona Act. There were no actual facts on that issue, because the court was not dealing with any particular election. The expert opinion concerning how long it might take varied from slightly over a week to a much longer, though

[21] In *Rescue Army v. Municipal Court*, 331 U.S. 549, 569 (1947), the Court stated the well-known rule of necessity as follows: "[C]onstitutional issues affecting legislation will not be determined in friendly, nonadversary proceedings; in advance of the necessity of deciding them; in broader terms than are required by the precise facts to which the ruling is to be applied; if the record presents some other ground upon which the case may be disposed of; at the instance of one who fails to show that he is injured by the statute's operation, or who has availed himself of its benefits; or if a construction of the statute is fairly possible by which the question may be avoided."

unspecified, period. The court adopted the view of the evidence that in its opinion rendered the statute unconstitutional.

Armed with that kind of record the court proceeded to wade through a catalogue of objections to numerous sections of the statute. It found five parts, including two sections and parts of two others unconstitutional. The court then declared that the entire statute — including parts whose operation and purpose have no conceivable dependence on the sections invalidated — must fall.

This, we submit, is not case or controversy adjudication. Indeed, it is very close to the Council of Revision approach rejected by the constitutional convention, an approach under which newly enacted statutes would have been reviewed for constitutionality prior to their operation by a panel composed in part of judges.[22]

We know of no case — and in the six years of this litigation the appellees have discovered none — in which this Court has approved the wholesale consideration of the constitutionality of a comprehensive regulatory statute, each of whose challenged provisions

[22] The eighth resolution in the Virginia Plan proposed to the constitutional convention of 1787 provided in pertinent part "that the Executive and a convenient number of the National Judiciary, ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final; and that the dissent of said Council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be again Negatived by an _____ [blank left in original] of the members of each branch." I Farrand, *The Records of the Federal Convention of 1787*, 21 (1966).

raises separate constitutional issues, in advance of, and in the absence of, the application of those provisions. The approach to that kind of statute has always been to consider the individual provisions as each is involved in concrete factual settings raising the constitutional issues of which the plaintiffs complain.

In two cases the Court has considered challenges to comprehensive labor regulatory statutes apart from the enforcement of specific provisions. *A.F.L. v. Watson*, 327 U.S. 582 (1946), and *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450 (1945). In both cases the Court refused to entertain the broadside attack. Other decisions outside the labor field substantiating the principle that "under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws"[23] include *Blanchette v. Connecticut General Ins. Corp.*, 419 U.S. 102, 147 (1974), and *California Bankers Ass'n v. Schultz*, 416 U.S. 21, 56-57 (1974). Even in the absence of a comprehensive statute, this Court has "often declined to decide important questions regarding the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case." *Kleppe v. New Mexico*, 426 U.S. 529, 547 (1976) (quoting *Longshoremen v. Boyd*, 347 U.S. 222, 224, (1954)).

The district court relied on a group of lower federal court decisions in purported support of its broadside attack on this statute. (App. A at 11). Reliance on those cases is misplaced. None involved wholesale, checklist review of a complex, comprehensive regulatory statute. Some of those cases suggest that in some

[23] *Broadrick v. Oklahoma*, 413 U.S. 601, 610-611 (1973).

circumstances, federal courts may consider a statutory provision if it has been applied in some other proceedings. Whatever the validity of that proposition in other contexts, it does not apply here. Not one of the five invalidated provisions has ever been interpreted or enforced in any case in which the parties involved complained of constitutional inadequacies. Of the five, the only one that has ever been interpreted or enforced in actual board or judicial proceedings is Section 1389, dealing with elections. The record discloses no objection, constitutional or otherwise, to any of the elections that have been held.

Before the lower court, the appellees also relied on *Doe v. Bolton*, 410 U.S. 179 (1973), and on the generality that the case or controversy requirement is more loosely applied in First Amendment cases. These arguments are also wide of the mark. *Doe v. Bolton* involved a single statutory provision and not a comprehensive regulatory statute. In addition, absent a facial attack, the only way that the provision at issue in *Doe v. Bolton* could have been challenged was by the deliberate commission of a criminal act. That is not true in this case. With regard to the argument that the First Amendment justifies a "roving commission"[24] approach, we know of *no* instance involving a First Amendment challenge or any other in which this Court has entertained an attack on a comprehensive regulatory statute apart from specific involvement of its provisions. In *California Bankers Ass'n v. Schultz, supra*, the Court refused to entertain such a suit. The attack in *Schultz* was based on First Amendment grounds. Moreover, as will be discussed below, First

[24] *Broadrick v. Oklahoma, supra*, at 610-611.

Amendment cases — especially freedom of assembly cases — frequently turn on the facts of the particular case.

It would have been unthinkable, we submit, for this Court to have simply proceeded in checklist fashion through the provisions of the Wagner Act, or Taft-Hartley, or Landrum-Griffin, deciding the fate of each of the provisions of those statutes in the absence of a record dealing with their actual application. Yet, this is precisely what the district court did. The appellees may contend that the Arizona statute poses a greater threat to individual liberties than does its federal labor law counterpart. We would disagree. But that is not the issue. As noted, this Court has never gone through a comprehensive, multifaceted, regulatory statute in Council of Revision fashion, deciding in the abstract the constitutional acceptability of one provision after another, and then based on conclusions concerning selected parts (in this case five) declared the whole act invalid.

Even the Smith Act and the Subversive Activities Control Act — which had much greater chilling effect than the present statute — were considered as required by Article III: as particular provisions were applied to particular individuals in real situations, the constitutional issues were raised in the context of those actual applications.[25] Beyond question, the oppo-

[25] Concerning the Smith Act, see *Noto v. United States*, 367 U.S. 290 (1961); *Scales v. United States*, 367 U.S. 203 (1961); *Yates v. United States*, 354 U.S. 298 (1957); and *Dennis v. United States*, 341 U.S. 494 (1951). For cases involving application of the Subversive Activities Control Act, see *United States v. Robel*, 389 U.S. 258 (1967); *Aptheker v. Secretary of State*, 378 [Continued]

nents of those statutes would have preferred the type of procedure used by the district court here. But that is not how a judicial system bounded by case or controversy works.

The appellees and the lower court relied on the enforcement stipulation. That stipulation provides no support for the district court's adjudication in the abstract. Indeed, it only emphasizes the advisory opinion quality of the decision from which this appeal is taken. Some of the stipulated cases, the secondary boycott cases, involved application of this statute to the appellee union. But the only provisions of the Act that were either interpreted or applied in those cases were parts 6, 7, and 10 of 1385 B. None of these provisions was held unconstitutional by the district court. Moreover, the teaching of this Court's decisions in the Smith Act and Subversive Activity Control Act cases, as well as many others, is that if legitimate constitutional issues were raised in those enforcement proceedings against the union, those cases provide the proper vehicle for deciding the constitutional issue, since it is the record in those cases that will disclose the actual adverse impact, if any, on protected constitutional rights.

The district court's discussion concerning overbreadth cannot convert the appellees' dislike for this Act into a case or controversy. Moreover, the overbreadth discussion ignores the holding and supporting rationale of this Court's decision in *Broadrick v. Okla-*

U.S. 500 (1964); *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1 (1961); *Albertson v. SACB*, 332 F.2d 317 (D.C.Cir. 1964), *rev'd*, 382 U.S. 70 (1965); *Communist Party v. United States*, 331 F.2d 807 (D.C.Cir. 1963), *cert. denied*, 377 U.S. 968 (1964); *Communist Party of the United States v. McGrath*, 96 F. Supp. 47 (D.D.C. 1951).

homa, 413 U.S. 601 (1973). As stated by this Court in *Broadrick:* "To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of the statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[26] At best, the measurement of these twin requirements — that the range of constitutionally protected activity must be real, and that it must be substantial with respect to the prohibitable activity — is difficult. In the absence of a record demonstrating the activity that the challengers in fact undertook in the particular case, it is impossible. In addition, *Broadrick* suggests that its rule may depend on the extent to which "conduct and not merely speech is involved. . . ." In an actual case or controversy the record would show the mix of speech and conduct. There is no such record here.

Section 1392, providing criminal penalties for violations of the Act, has never been enforced. Determination of its constitutionality should await a case involving its application. The district court's holding that § 1392 is facially unconstitutional rests largely on perceived overbreadth problems.

We recognize that not only falling swords, but also hanging swords, can have an effect. However, the only reason that the district court was able to find a Damoclean effect at all is that it consistently selected the only interpretation of the statute that would raise the constitutional question. In consistently assuming the worst, the district court disregarded the principle stated by this Court in the companion case to *Broad-*

[26] 413 U.S. at 615.

rick, Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 578-79 (1973):

> "[T]here are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest."

Application of the *Broadrick* test, therefore, depends on the existence of an actual case or controversy. Analysis of *Broadrick* in light of this case shows that here, there is no case or controversy.

2. *Even If There Were a Case or Controversy, the District Court Should Have Abstained, Because the Constitutional Issues Depend on Interpretations of the Statute.*

The lower court's constitutional holdings are laced with necessary rulings as to what the statute means. In each case, the court adopted that view of the statute that would invalidate.

For example:

A. The court's holding that the election procedures are unconstitutional rests mainly on assumptions concerning the time periods that those procedures would consume. One of those assumptions — asserted by the plaintiffs for the first time at trial — is that "the general application of the Arizona Administrative Procedure Act stamps a 20-day period . . . "[27] between the filing of the election peti-

[27] App. A at 26.

tion and the pre-election hearing. The appellants strongly disagree with this view of Arizona law. Section 1389 C requires "an appropriate hearing on due notice." What is appropriate will vary from case to case depending upon the particular facts of that case. The Legislature having provided for an *appropriate* hearing on *due* notice takes this statute out of the general AAPA requirement and permits determination of the needs of the individual case.[28] The district court could not assume that Arizona state courts would interpret the section to require application of the AAPA.

B. Section 1382 1 of the Act defines a permanent agricultural employee as one "over 16 years of age who has been employed by a particular agricultural employer for at least 6 months during the preceding calendar year. . . ." The lower court asserted that the practical effect of this provision was "that a particular worker must be employed during two successive harvests before being entitled to vote."[29] Given the court's conclusion that the constitutional defect in the election procedures rested on time delays and employee transience, this conclusion that as a practical matter the Act granted permanent employee status only to those who had been employed for two previous harvests was significant. It is based on the court's acceptance of the appellees' assertion that

[28] The pertinent part of the Arizona Administrative Procedure Act provides: "In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice. *Unless otherwise provided by law*, the notice shall be given at least twenty days prior to the date set for hearing." Ariz. Rev. Stat. Ann. § 41-1009 (Supp. 1977) (emphasis added).

[29] App. A at 28.

"calendar year" means the period from January 1 through December 31. It is the appellants' view that calendar year means a year as measured by the calendar — and therefore a complete year of 365 days — rather than a crop year, which in some cases would be much shorter. Again, this provision has not been interpreted by the Arizona state courts.

C. The court held unconstitutional the prohibition against dishonest, untruthful and deceptive publicity directed against secondary consumers. Substantial reliance was placed on this Court's observation in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (*Times Libel*), that "erroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive' ".[30] In *Times Libel*, this Court held that the breathing space requirement is satisfied by the actual malice test. Even assuming, therefore, the correctness of the lower court's determination that the Arizona Legislature's prohibition against dishonest, untruthful and deceptive secondary consumer publicity raises constitutional issues, *Times Libel* would indiciate that the constitutional requirements would be satisfied by the knowing falsehood or reckless disregard standard. Whether the statutory prohibition incorporates the *Times Libel* actual malice standard is a question of Arizona law concerning which the Arizona courts have not spoken.

D. The district court held unconstitutional the provision in Section 1385 C that "no employer shall be required to furnish or make available . . . facilities

[30] 376 U.S. at 271-72.

to enable [a union] to communicate with employees. . . ." In support of its holding, the court observed:

> "If the grower doesn't have to 'furnish facilities' that clearly means he doesn't have to provide a time or place when the union can communicate with his workers, and thus also means that he does not have to allow them to come onto his property."[31]

Throughout this litigation, the appellants have vigorously disagreed with the foregoing view of this statutory provision. The statute provides that employers are not required to provide *facilities*. Facilities does not mean real property. It means facilities. It means those items that might be used to facilitate communications, such as microphones, platforms, chairs, etc. It may mean structures or buildings. It clearly does not mean that the employer in all cases may deny access to his property and no Arizona court has so held.

E. This Court held in *NLRB v. Gissell Packing Co.*, 395 U.S. 575 (1969), that the NLRB has authority to issue bargaining orders requiring an employer to bargain without a certification election in those instances where employer practices have made it impossible to hold a fair election. This Court has never suggested that *Gissell* rested on constitutional grounds. Nevertheless, the district court found the absence of specific bargaining order authority relevant to the constitutionality of the election procedures under the Arizona Act. Once again, this constitutional decision necessarily depends on inter-

[31] App. A at 39.

pretation of the state statute. The authority of the Arizona Agricultural Employment Relations Board to issue bargaining orders has been the subject of strong and continuous disagreement between the parties. The Arizona courts have never passed on the issue. Once again, the district court adopted the interpretation that raises rather than avoids the constitutional issue. It interpreted the Act to preclude the issuance of bargaining orders, and that interpretation constitutes part of the premise for its conclusion that the election procedures would be applied in such a fashion as to make them unconstitutional.[32]

In each of these five instances, the statute could have been interpreted one of two ways. One interpretation would lead to what the lower court considered to be a serious constitutional question. The other would either totally avoid or at least lessen the constitutional concern.

Under those circumstances, the duty of the federal court is clear. It must either (1) adopt that view of the statute that will save rather than destroy[33] or (2) await an interpretation of the State Supreme Court, whose province it is to say what the statute means.[34]

[32] App. A at 19, 29-30.

[33] *United States v. Vuitch*, 402 U.S. 62, 70 (1971). Arizona law is in accord. *Frye v. South Phoenix Volunteer Fire Co.*, 71 Ariz. 163, 170-71, 224 P.2d 651, 656 (1950).

[34] *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 500 (1941); *accord, Elkins v. Moreno*, U.S. (1978); *Bellotti v. Baird*, 428 U.S. 132, 146-47 (1976); *Carey v. Sugar*, 425 U.S. 73, 79 (1976); *Boehning v. Indiana State Employees Ass'n, Inc.*, 423 U.S. 6, 7-8 (1975); *Harris County Commissioners Court v. Moore*, 420 U.S. 77, 84 (1975).

The lower court's consistent interpretation of controlling principles of an important state statute in a manner that destroys rather than saves, and doing so outside the context of application of those provisions to any plaintiff is ample ground for summary reversal.

At the very least, such a novel approach raises a substantial federal question worthy of this Court's consideration on the merits.[35]

3. *Election Procedures Under the NLRA and the AERA — Policy Choices By Legislature and Judiciary.*

The district court did not hold Section 1389, dealing with representatives and elections, unconstitutional on its face. Invalidity depended upon (1) the court's acceptance of the appellees' view, based on highly speculative and conflicting evidence concerning how the section *might* be applied, and (2) the court's acceptance of the appellees' view concerning two disputed issues of state law, the applicability of the Arizona Administrative Procedure Act to Section 1389's election procedures, and the meaning of "previous calendar year."

[35] The district court offered an explanation in connection with its holding concerning Section 1385 B 8's prohibition against untruthful secondary consumer publicity, discussed *infra*, pages 34-39. The court's opinion states: "Although defendants, as to this particular provision and with so many others, are always proposing the narrowest interpretation possible, and suggesting that this is the way that this, and many other provisions, should be interpreted to save constitutionality of a statute, yet, as has been said, where First Amendment rights are involved, this prohibition in this section of the statute involving as it does a prior restraint on free speech, must be narrowly drawn, and the speaker should not be 'chilled' by the potential that some interpretation of his ex-

[Continued]

With that foundation alone, the court held Section 1389 unconstitutional because of the unlikelihood that elections could be held during periods of peak employment.

Nevertheless, the court did not limit its holding of unconstitutionality to those circumstances that were necessary to its holding, that is, where elections could not be held during peak employment periods. Even accepting the court's view of the evidence and of state law, therefore, the holding presents substantial federal questions for several reasons:

A. *Implicit Doubts Concerning the Constitutionality of NLRA Election Procedures.* The election procedures of the Agricultural Employment Relations Act have been characterized by appellees as "virtually identical to those of the NLRA. . . ."[36] That characterization is correct.

The reason that the election procedures were held unconstitutional was that under certain circum-

pression concerning which he has no knowledge may make his statement 'untruthful.' " App. A at 34.

At least in the context of the holding related to Section 1385 B 8, the court's holding would be understandable if a prior restraint were in fact involved. It is not. There is no record concerning any 1385 B 8 activity. Holding that provision invalid on its face as a prior restraint assumes that the only way it will ever be enforced is by injunction, and that is not what the statute says. If in fact, an injunction were issued under 1385 B 8 against *future* dissemination of untruthful publicity, there would be a legitimate prior restraint issue. Absent such an injunction there is no prior restraint issue, and the asserted basis for the court's departure from the well-established rule that statutes must be interpreted so as to save them, disappears.

[36] Plaintiffs' Proposed Findings of Fact, Submitted to the District Court, p. 8.

stances they might be capable of permitting too long a time period to elapse between petition filing and election. As a consequence, there might be cases in which the election could not be held until after the harvest peak when many employees might be gone. Yet the holding of unconstitutionality is not limited to cases involving crops with short harvest periods. It is a total invalidation, notwithstanding the undisputed evidence that some harvests in Arizona (including the all-important citrus harvest) last practically all year.[37]

The undisputed evidence also shows that election procedures under the NLRA frequently deal with short, seasonal employment in a rather substantial number of industries.[38] Indeed, in many of these

[37] The citrus harvest lasts between 45 and 49 weeks. Tr. 162. The district court found (App. A at 15) that the citrus crop is the State's largest. The opinion also asserts that "[i]n citrus, crews are constantly moved from employer to employer throughout the harvest season picking only intermittently for any particular employer for from a few days to a few weeks." App. A at 16. We know of no support in the record for this statement, but even assuming its correctness, it is irrelevant. Since it is beyond dispute that the citrus harvest lasts most of the year, an employer's crew will return from time to time, affording several opportunities during the year to hold the election. The significance of possible change in crew makeup is discussed in subpart C, *infra*, pages 30-33.

[38] Tr., 88-94. See *Ruby Co., dba Shelly Processing Co.*, 129 NLRB 110, 46 LRRM 1510 (1960) (potato processing); *Bordo Products*, 117 NLRB 313, 39 LRRM 1220 (1957) (fruit processing); *Cleveland Cliffs Iron Co.*, 117 NLRB 668, 39 LRRM 1319 (1957) (Great Lakes shipping); *Sebastopol Cooperative Cannery*, 111 NLRB 530, 35 LRRM 1510 (1955) (apple processing); *Libby, McNeill & Libby*, 90 NLRB 279, 26 LRRM 1205 (1950) [Continued]

industries it is agricultural seasonality that limits the period of peak employment.[39]

For these reasons, a holding that election procedures virtually identical to those of the NLRA are unconstitutional, without limiting the holding to those instances where there are any differences between the two necessarily raises questions concerning the constitutionality of election procedures under the NLRA, particularly as applied to a rather broad segment of industries subject to NLRB jurisdiction. Such a holding presents the clearest possible substantial federal question. It probably amounts to summarily reversible error.[40]

B. *The Constitutional Right Violated.* The district court appears to have taken the view that the constitutional right violated by Section 1389 as it

(vegetable canning); *Alaska Salmon Industry*, 90 NLRB 168, 26 LRRM 1199 (1950) (salmon canning); *S. Martinelli & Co.*, 81 NLRB 1179, 23 LRRM 1361 (1949) (soft drink bottling); *California Growers, Inc.*, 80 NLRB 578, 23 LRRM 1194 (1948) (fruit packing); *Foremost Dairies, Inc.*, 80 NLRB 764, 23 LRRM 1129 (1948) (ice cream manufacturer); *Imperial Tobacco Co.*, 74 NLRB 1038, 20 LRRM 1276 (1947) (tobacco drying and processing).

[39] This is true, for example, in the case of the various agricultural packing and canning industries listed in footnote 38.

[40] The Arizona Board has greater flexibility to deal with the problems of short peak employment than the NLRB has. The Arizona regulations permit the Board, where appropriate, to defer all questions except questions concerning representation until after the election. Thus, once questions concerning representation have been resolved, the Arizona Board, unlike the NLRB, has the authority to order an election immediately. (See Arizona Agricultural Employment Relations Board Regulations R4-2-19 and R4- [Continued]

might be applied is freedom of assembly/association.[41] This holding is totally unprecedented. It is clear that membership in a labor union is protected association. *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1, 5 (1964). We know of no decision other than the one appealed from, however, that holds or even vaguely suggests that a secret ballot labor election procedure unconstitutionally infringes on freedom of assembly/association.[42] Conceivably, there could be a labor election procedure so unfair that its effect on associational interests would render it constitutionally suspect. This clearly cannot be the case, however, with a statute whose election procedures are "virtually identical to the NLRA" and whose actual impact has only been speculated.

2-22; the Regulations are part of the record in this case. See also Tr. 578, 579, 581, 584, 670.) This effectively gives the Arizona Board the discretion to follow a procedure that is very similar to the California procedure, in those cases where such a procedure is appropriate.

[41] The appellees also took the position that the right to vote was violated. The district court appears not to have accepted that argument, and it is clearly wide of the mark. First, we are unaware of any holding that the constitutionally guaranteed right to vote extends to labor elections. Unions are not public entities. Moreover, assuming that there is a constitutionally guaranteed right to vote in a labor election, it cannot be measured in a vacuum. This Court's decisions dealing with voting rights have always considered the impact on those rights arising out of particular elections. As will be discussed below, the actual impact on voting will vary greatly depending on a number of variables, none of which has been established in this case.

[42] *Cf. International Bhd. of Teamsters v. NLRB*, 568 F.2d 12, 20 (7th Cir. 1977).

This Court's decisions clearly demonstrate that the applicability of freedom of assembly/association principles often turns on variations in the facts of the particular case. Compare, *e.g., Feiner v. New York*, 340 U.S. 315 (1951), with *Edwards v. South Carolina*, 372 U.S. 229 (1963), and *Edwards* with *Adderly v. Florida*, 385 U.S. 39 (1966). There is no context in which the facts will vary more from case to case than in agricultural labor. As observed by Mr. Cesar Chavez, National President of the appellee union, "there isn't anything typical in agriculture. It is all over the map."[43]

Of the provisions held unconstitutional, § 1389 is the only one that has been either interpreted or enforced, as shown by the enforcement stipulation. It is also the only invalidated provision concerning which any substantial evidence was presented at trial. Yet neither the enforcement stipulation nor the trial transcript contains any evidence of a single election under the AERA in which time delays raised any problems, or in which these plaintiffs were involved.[44] There is not a single instance, therefore, in which actual application of Section 1389 has borne out the appellees' speculated fears. Neither is there any evidence of any objection — constitutional

[43] Tr. 231.

[44] The reason that these plaintiffs have not been involved in any AERA election is that since they object to the Act they refuse to use it. Tr. 209. This does not alter the fact that they have had *no* experience with this section concerning whose effect they could only speculate, nor the further fact that experience with elections under the Act to date has not disclosed a single instance in which time delays were a problem.

or otherwise — to any aspect of the elections that have been held. This is hardly an appropriate foundation on which to build the first case in history for the proposition that NLRB-type secret ballot labor elections can violate freedom of assembly.

If in fact election procedures identical on their face to those of the NLRA can ever rise to the level of imposing an impermissible burden on freedom of assembly/association, the time to make that measurement and that determination will be when and if it happens. In the meantime, the lower court's holding that such a burden is imposed by NLRA-type procedures without regard to the differentiating facts of the individual case surely raises a substantial federal question.

C. *Policy Choices by Legislators and Judges.* Obviously, peak employment seasons of short duration, either under the Arizona Act or under the National Act, present special problems. The optimum solution to those problems is neither readily apparent nor constitutionally mandated. Perhaps the most grievous error committed by the district court was its assumption that the Arizona Legislature was constitutionally limited in its available policy choices to holding the election during peak employment periods.

There are of course advantages to an inflexible requirement that elections must be held during the employment peak. It permits greater participation during the same season in which the election petition is filed. This basic solution was the one selected by the California Legislature; under its statute, an

election must be held within seven days after the petition is filed.[45]

There are also disadvantages to such a system, however. It permits the union to organize as long as the union considers advantageous,[46] and then to limit post-petition campaigning by both sides. Also, the union can control the date of the election by its decision as to the timing of the election petition filing. In most instances, seven days is too short a period to determine the appropriate bargaining unit, and while these and other pre-election issues can be deferred until after the election, it is certainly not an unreasonable legislative decision to conclude that it is more orderly to leave it to the Board's discretion whether to decide these issues prior to the election.

An alternate to the California scheme is the one employed by the NLRB: hold the election during the current peak season if it is feasible to do so. If it is not, postpone the election until the next peak sea-

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[45] California Agricultural Labor Relations Act, Cal. Lab. Code § 1140 *et seq.* Section 1156.3(a) (West Supp. 1978), requires that the Board "shall direct a representation election by secret ballot . . . within a maximum of seven days of the filing of the petition." Under this procedure, it is theoretically possible for the election to be carried by as few as 26% of the peak employment workers. The election must be held when at least 50% of the employees are present, and a majority of those 50% would be 26%. See Tr. 243.

[46] Mr. Chavez acknowledged that the reason the pre-petition organizational activities took three to six weeks was that the union used that period not just to assure that it had enough support to qualify the petition, but to assure that it had enough support to win the election. Tr. 115, 117, 119.

son, at a date to be determined by the regional director. *Choctaw Cotton Oil Co.*, 84 NLRB 660, 24 LRRM 1307 (1949). This permits the Board to take into account all relevant factors — including the advantages of current peak season elections — rather than restricting the Board to one factor alone. When an industry has two or more seasonal peaks, as is the case with much of Arizona's agricultural production, the delayed representation election is ordered at the time the greatest number of workers is employed.[47] Appellees have not taken issue with the Board's authority to follow the same procedure where appropriate.

Mr. Chavez objected to postponement until the following employment season because the work force might change in the meantime.[48] This argument cuts both ways. To whatever extent it is true, it necessarily means that one group of employees will make representation decisions that will be binding on a significantly different group of employees. This will be true no matter when the election is held. Faced with that kind of situation, the Legislature must have some discretion in making the required policy choices. Certainly the Constitution does not require the Legislature to favor employees who work in the

[47] See, *e.g.*, *Libby, McNeill & Libby*, 90 NLRB 279, 26 LRRM 1205 (1950); *California Growers, Inc.*, 80 NLRB 578, 23 LRRM 1194 (1948). See also Tr. 588-94.

[48] Tr. 167. He also asserted that some of the pro-union employees might not be rehired. If the reason that they were not rehired is because of their union activity, the appropriate corrective would be an unfair labor practice proceeding against the employer under Ariz. Rev. Stat. Ann. § 23-1385 A (Supp. 1977).

first season — some of whom will not return to be bound by the election decision — over employees in the second season who will be bound.[49]

The district court's rationale fails to account adequately for the fact that under the AERA the Board is specifically authorized to decide whether "the unit appropriate for the purposes of collective bargaining shall consist of either all temporary agricultural employees or all permanent agricultural employees ... or both." Section 1389 B. Good faith performance of this duty by the Board should lessen significantly the problem perceived by the district court of one group of employees determining the interests of another. The lower court accepted the appellees' hypothesis that "[a]n employer could ... respond to a petition for an election filed by a small minority of his permanent, year-round employees, and if they should vote for no-union, then no matter how many hundreds or thousands of employees that employer hires for that unit, thereafter they are barred from holding another election for twelve months — clearly an absolute frustration of their right of free association." (App. A at 28-29). This hypothesis assumes either bad faith or bad judgment by the Board in determining the bargaining

[49] Even in California, it is not always possible to hold the election during peak employment periods. Tr. 157, 167. In such a case, the California Board has followed the NLRB procedure. Thus, where the California Board found it necessary to order run-off elections because of unavoidable delay resulting from the determination of objections to the conduct of the initial election, it ordered the run-off to be held during the employer's next peak season. *In the Matter of Tenneco Farming Co.*, 3 ALRB No. 20 (1977).

unit. If such a hypothetical case ever materializes, that will be the time to decide the relevant constitutional issues, in light of the actual facts.

For over four decades this Court has vigilantly prevented judicial meddlesomeness into legitimate state legislative efforts to deal with important issues.[50] The same problem is presented by this case. Few important policy issues are easily soluble. Labor elections in seasonal industries are no exception. The California Legislature has elected one solution. The National Labor Relations Board has elected another. Arizona policymakers, we submit, are not confined to preferring one of these choices over the other.

4. *Dishonest, Untruthful and Deceptive Secondary Consumer Publicity Under the NLRA and the AERA.*

In holding § 1385 B 8 unconstitutional on its face, the district court has again called into constitutional question a provision of the National Labor Relations Act. The proviso to Section 8(b)(4)(ii)(B) of the federal act authorizes "publicity ... for the purpose of truthfully advising the public ... that a product or products are produced by an employer with whom the labor organization has a primary dispute...."[51]

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[50] See *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952); *Nebbia v. New York*, 291 U.S. 502 (1934). In *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 813 (1976), this Court stated: "That [the state] might have furthered its underlying purpose more artfully, more directly, or more completely, does not warrant a conclusion that the method it chose is unconstitutional."

[51] 29 U.S.C. § 158(b)(4)(ii)(B) (1970).

Section 1385 B 8 of the Arizona Act, held unconstitutional on its face by the district court, makes it an unfair labor practice:

> "To induce or encourage the ultimate consumer of any agricultural product to refrain from purchasing, consuming or using such agricultural product by the use of dishonest, untruthful and deceptive publicity. Permissible inducement or encouragement within the meaning of this section means truthful, honest and nondeceptive publicity which identifies the agricultural product produced by an agricultural employer with whom the labor organization has a primary dispute. Permissible inducement or encouragement does not include publicity directed against any trademark, trade name or generic name which may include agricultural products of another producer or user of such trademark, trade name or generic name."

There is no realistic difference between the federal proviso and its Arizona counterpart. One permits truthful publicity and the other prohibits untruthful, deceptive and dishonest publicity. There is no practical difference — certainly none of constitutional dimension — between authorizing the truthful and prohibiting the untruthful.

In *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58 (1964) *(Tree Fruits)*, this Court interpreted the proviso in Section 8(b)(4)(ii)(B) of the NLRA to permit a union to apply secondary consumer pressures by picketing as well as by handbilling against the product of an employer with whom the union has a primary dispute. The issue under Section 1385 B 8 of the present Act differs from the issue in *Tree Fruits* in two respects, and the differences cut in opposite directions. First, the Arizona

provision deals with all secondary consumer pressures, whereas *Tree Fruits* dealt only with picketing. Second, it does not prohibit all such publicity, but requires merely that it be truthful. At the very least, the issue raised by this aspect of the district court's holding is substantial. Even accepting the lower court's interpretation of the statute, its holding reaches important issues that were not reached by any of the Justices in the *Tree Fruits* case.

The district court's reliance on *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), and *A.F.L. v. Swing*, 312 U.S. 321 (1941), is misplaced. Those cases involved prior restraints. This case does not. A prior restraint issue would result under this provision only if an injunction were to issue in a particular case, as in *Keefe* and *Swing*. The conduct prohibited by Subsection 8 is an unfair labor practice. As such, it can be dealt with by the Board or by the courts. Neither is limited to prohibiting future activity. Sanctions for past conduct may be imposed.[52] Consideration of § 1385 B 8 on its face, therefore, does not raise the prior restraint issue. The time to consider the possible bearing of *Keefe* and *Swing*[53] on Subsection 8 will be when, if ever, an injunction is issued pursuant to it. In six years of the statute's existence none has issued yet. The prior restraint question was, therefore, not properly before the district court.

[52] The difference between prior restraint and after-the-fact punishment was emphasized by this Court in *Keefe:* "Under *Near v. Minnesota*, 283 U.S. 697 (1931), the injunction, so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on First Amendment rights. Here, as in that case, the injunction operates, not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature 'of any kind' in a city of 18,000." 402 U.S. at 418-19.

[53] The second aspect of the district court's reliance on *Swing* is also misplaced. *Swing* invalidated a state law that in effect prohibited all primary picketing in the absence of a primary dispute. Section 1385 B 8, by contrast, deals with secondary boycott attempts to subject employers with whom the union has no quarrel to the adverse effects of the boycott. This is, therefore, simply another example of an attempt — common to many labor laws, federal and state — to control secondary boycotts.

[Continued]

This Court has made it very clear that aside from prior restraints, the maximum First Amendment protection to which falsehood is entitled is that afforded by the *New York Times v. Sullivan*, 376 U.S. 254 (1964) *(Times Libel)*, actual malice standard. That was the holding in *Times Libel*, and the point was made even more clear in *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964):

> "[T]he use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .' *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection."

It is possible that in the labor setting, falsehood is not entitled even to *Times Libel* protection. The proviso to Section 8(b)(4)(ii)(B) of the NLRA is instructive

in this regard. So also is *United Farm Workers Organizing Committee v. Superior Court*, 4 Cal.3d 556, 483 P.2d 1215, 94 Cal. Rptr. 263 (1971), a case brought by the appellee union's predecessor. In that case the California Supreme Court ruled that "Petitioners may properly be enjoined from making false and untruthful statements in connection with a labor dispute." *Id.* at 571; 483 P.2d at 1226; 94 Cal. Rptr. at 274. Similarly, in *Corrigan v. Barbers and Beauticians Union, Local 253*, 251 Cal. App.2d 490, 59 Cal. Rptr. 533 (1967), the California Court of Appeals held that the distribution of "false and misleading literature" or the carrying of "false and misleading banners" in a labor dispute may be enjoined.

If the prohibition against untruthful secondary consumer pressures is subject to the same strictures held applicable in *Times Libel*, then the first task of the federal judiciary should be to determine whether the *Times Libel* actual malice test applies to this statute. In *Elfbrandt v. Russell*, 384 U.S. 11 (1966), this Court took into account the Arizona Supreme Court's interpretation of the knowledge or intent requirement applicable to Arizona's loyalty oath. A no lesser opportunity should be afforded in connection with this statute, which has significantly greater impact on the people of Arizona. Similarly, the interpretation of the statute in *Tree Fruits* by a majority of this Court was influenced at least in part by the principle that statutes should be interpreted, if possible, so as to make them constitutional.[54] The Arizona courts should be given the same opportunity.

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[54] 377 U.S. at 63.

Before the district court, both sides relied on *Vanasco v. Schwartz*, 401 F.Supp. 87 (S.D.N.Y. 1975), *aff'd*, 423 U.S. 1041 (1976). *Vanasco* involved the regulation of falsehoods in connection with political campaigns. Dicta in that case provide convenient quotations for both sides in this case. The real significance of *Vanasco*, however, is its holding, consistent with *Times Libel* and *Garrison*, "that any state regulation of campaign speech must be premised on proof and application of a *Times* 'actual malice' standard." 401 F.Supp. at 92. In *Vanasco*, the three-judge district court considered the case after the New York State Board of Elections had applied that State's Fair Campaign Code and its own implementing regulations to particular alleged campaign violations and had made findings as to whether the individuals had made statements knowing they were false or acting with reckless disregard for truth or falsity. Any attack on Section 1385 B 8 should have followed that same procedure.

5. *Compulsory Arbitration, Substantive Due Process, and Incorporation of the Seventh Amendment.*

If for no other reason, plenary review by this Court (or summary reversal) would be warranted because a three-judge federal district court has held the Seventh Amendment binding on the states, contrary to the numerous and consistent holdings of this Court and every other court of which we are aware.

The district court's holding and rationale related to the ten-day injunction-compulsory arbitration provision are:

> "We therefore strike down this section of the statute, A.R.S. § 23-1393 (B), as unconstitutional

in violation of the due process clause of the Fourteenth Amendment to the Constitution and the Seventh Amendment providing for right to trial by jury." (App. A at 42).

In support of its due process holding, the lower court cited three cases.[55] The regulations involved in those cases were more pervasive and more burdensome than the provision here at issue. In addition, all three were pre-*Nebbia*, substantive due process cases. The principal case, *Chas. Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522 (1923), was decided just two months after *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), and relied on it as authority. It would seem quite clear from subsequent decisions of this Court that today substantive due process considerations would not bar states from adopting binding arbitration provisions of the limited kind involved in this case.[56] At the very least, a three-judge federal district court's reliance on those pre-*Nebbia* substantive due process cases for such a proposition raises a substantial federal question.

The district court's opinion does not discuss the incorporation issue, but the court has necessarily held that the Seventh Amendment is incorporated into the Fourteenth Amendment, and binding on the states. Otherwise, the Seventh Amendment would not be rele-

[55] *Dorchy v. Kansas*, 264 U.S. 286 (1924); *Chas. Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522 (1923); and *Graves v. Northern P.R. Co.*, 5 Mont. 556, 6 Pac. 16 (1885).

[56] *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952); *County-Wide Insurance Company v. Harnett*, 426 F. Supp. 1030 (S.D.N.Y.), *aff'd*, 431 U.S. 934 (1977).

vant to the constitutionality of this state statute. We had always assumed that the Seventh Amendment was one provision that would never be incorporated, and scores of cases have so held.[57] If the Seventh Amendment is to be incorporated however — twenty dollar limitation and all — it should be done only after careful consideration by this Court and not by a single sentence pronouncement with no supporting rationale in a district court opinion.[58]

6. *Access to Employer Facilities.*

The district court held § 1385 C, dealing with the employer's "materials, information, time or facilities", unconstitutional in light of the testimony and evidence. It is true that any constitutional issues possibly raised by this section can be determined only in the light of facts. The kinds of facts required, however — even assuming that the Arizona courts would construe the section as the district court did, adverse to its constitutionality — are not part of this record.

The leading case dealing with union organizing activity on employer premises under the National Labor Relations Act is *NLRB v. Babcock and Wilcox Co.*, 351

[57] See headnote 12 to the annotations to the Seventh Amendment in United States Code Annotated for citations to the relevant cases. For illustrative holdings, see *Olesen v. Trust Company of Chicago*, 245 F.2d 522 (7th Cir.), *cert. denied*, 355 U.S. 896 (1957); *Melancon v. McKeithen*, 345 F. Supp. 1025 (E.D. La.) *aff'd*, 409 U.S. 943 (1972); *U-Haul Co. of Alabama v. State*, 316 So.2d 685 (Ala. 1975); *Bringe v. Collins*, 274 Md. 338, 335 A.2d 670 (1975).

[58] *In re Smith*, 381 Pa. 223, 112 A.2d 625, *appeal dismissed*, 350 U.S. 858 (1955), the only case relied on by the district court for the jury trial aspect of its holding, dealt solely with the jury trial provisions of the Pennsylvania Constitution.

U.S. 105 (1956). In that case the Court treated the problem as one of statutory rather than constitutional dimension. The Court clarified that the requirements of § 8 (a)(1) in this respect are as follows:

> "It is our judgment, however, that an employer may validly post his property against nonemployee distribution of union literature *if reasonable efforts by the union through other available channels of communication will enable it to reach the employees* with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution." 351 U.S. at 112. (emphasis added).

This Court further observed in *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972), that "[t]he Board and the courts have the duty to resolve conflicts between organization rights and property rights, and to seek a proper accommodation between the two."

There is no suggestion in *Babcock and Wilcox* or *Central Hardware* that the requirements of Section 8(a)(1) represent a constitutionally irreducible minimum.[59] Even assuming that they did, however, the unmistakable teaching of those cases is that union access to employer premises depends upon the facts of the particular case, particularly, the availability of other channels of communication, and whether the employer has discriminated against the union by allowing other distribution. There is of course no

[59] This point was reemphasized by *Hudgens v. NLRB*, 424 U.S. 507 (1976), involving striking members of the union picketing in front of their employer's store located in a shopping center. The Court observed, "the rights and liabilities of the parties in this case are dependent exclusively upon the National Labor Relations Act." *Id.* at 521.

evidence of this kind on the record, because this case does not involve any specific application of the provision in question.[60]

The district court's holding necessarily rests, therefore, on three assumptions: (1) that under Arizona law facilities does not mean facilities, it means premises; (2) that the *Babcock and Wilcox* standards are constitutionally required; and (3) that under all circumstances in which § 1385 C will be applied, the employer will violate the requirements that there be other available channels of communication and that there be no discrimination against the union by allowing other distribution.[61]

[60] Indeed, though the district court declared that its holding concerning this subsection was one of the two provisions in connection with which evidence needed to be considered, (App. A at 6, 14) the court did not list § 1385 C as one of the provisions as to which evidence was presented. The opinion states: "Evidence presented during the four day trial was introduced relative to A.R.S. § § 1384, 1385(A)(5), 1385 (B)(11), 1385(D), 1389, and on the plaintiffs' claim that the exclusion of stitchers and haulers and sixteen-year olds from the AERA, § 1382(1) and 1382(1)(g), was a violation of the Equal Protection Clause as well as a similar claim that exclusion of those farm workers who did not work for the same employer the previous calendar year from representation elections was likewise a violation of the Equal Protection Clause." *Id.* at 5.

[61] Despite its assertion that its ruling on § 1385 C was in light of the evidence, the district court's only factual determination related to this provision is its reference to "testimony and other evidence and really not disputed by defendants that the vast majority of farm workers are migratory and generally reside in areas or labor camps located on property owned by the employer. . . ." App. A at 37. This assertion is not supported by the evidence (See Tr. 221-24, 254, 517) and is "disputed by defen-

[Continued]

7. The District Court Erred in Concluding that Constitutional Defects in Parts or All of Four Sections Required Invalidation of the Entire Act.

The AERA consists of fifteen sections. These sections are interrelated in the sense that they constitute a comprehensive effort to deal with the varied problems of agricultural labor. Many parts of the Act deal with separate subjects, however, and implement policies that are not dependent on other parts. The prevention of unfair labor practices, for example, has a totally separate existence and function from the election procedures.

Of these fifteen sections, the district court held that only two were totally invalid. (One of these, Section 1392 dealing with criminal penalties, the court conceded to be severable.[62]) It also found constitutional defects in parts of two other sections.[63] The court

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dants." Far more important, however, the controlling facts do not concern where the workers live, but whether there are adequate alternative means of communication, and whether the employer has discriminated. The district court's suggestion that § 1389 I somehow forecloses alternatives is obviously wrong. Section 1389 I deals only with the employer's obligation to furnish a list of employees in connection with an election. It has nothing to do with alternative means of communication, which would vary from case to case, depending on such physical circumstances as the layout of the employer's property, the employer's attitudes concerning the use of that property, and other nearby property that might be used for publicity purposes.

[62] See App. A at 12.

[63] Two of the five invalidated provisions are parts of the same Section, 1385 B 8, prohibiting untruthful, etc. secondary consumer pressures, and 1385 C dealing with access to employer facilities.

therefore declined to find constitutional defects in the great majority of the statutory provisions, including many vigorously attacked by the appellees. Nevertheless, the entire Act was held unconstitutional.

This wholesale invalidation flies in the face of common sense and the square holdings of this Court. The point is best illustrated by the unfair labor practice provisions. The Arizona Legislature has concluded that the twenty practices described in subsections 1385 A and B are inimical to state policy. Each represents a separate policy determination. They include such practices as employer interference with his employees' rights to join and participate in union activities, employer domination or interference with the formation or administration of labor organizations, secondary boycott activities, union picketing of an employee's home, and violent conduct for the purpose of preventing the marketing of agricultural products. Before the district court, the appellees advanced constitutional challenges to six of the twenty unfair labor practices, parts 6, 7, 8, 11, 12 and 13 of § 1385 B. The court ruled in their favor on only one of the six, Section 1385 B 8. Despite the court's declination to accept the appellees' argument concerning five of the six challenged unfair labor practices, the appellees have succeeded in invalidating not only the remaining five, but also the fourteen that they did not even challenge. This includes the prohibitions against *employer* unfair labor practices, which are no more dependent on any of the invalidated provisions than if they appeared in a separate statute. Six of the twenty cases brought under the Act as of January of 1977 were unfair labor practice proceedings. (See enforcement stipulation.) None of those cases depended in any way on the existence of

any of the five invalidated provisions. The State has a legitimate interest in continuing to prohibit and punish unfair labor practices, either by employers or by unions.

The district court's only justification for its broadside interdiction of the statute is contained in two sentences. In its discussion of the election procedures, the court asserts that: "If [Section 1389, dealing with elections] fails, the rest of the Act must fail, since most of the use of the Act would apply only if farm workers were initially free to organize and not if the exercise of such a constitutional freedom of assembly were made impossible." (App. A at 25). Similarly, at the conclusion of its opinion the court states that its holding concerning election procedures, "coupled with the other sections struck down, results in a complete perversion of the expressed intent of the Legislature. . . ." (App. A at 43).

These *a priori* assertions represent a total failure even to consider, much less apply, the standards for severability prescribed by this Court.[64] The assertions are also wrong.

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[64] The general rule was stated by this Court in *Champlin Rfg. Co. v. Corporation Commission of the State of Oklahoma*, 286 U.S. 210, 234 (1932), as follows: "The unconstitutionality of a part of an act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." See also *Buckley v. Valeo*, 424 U.S. 1 (1976), and *United States v. Jackson*, 390 U.S. 570 (1968). The Arizona rule is virtually the same. *State ex. rel. Berger v. Superior Court*, 106 Ariz. 365, 476 P.2d 666 (1970).

Very simply, the proscriptions against employers' making financial contributions to a union, or against a union's picketing an employee's home, stand on their own as policy determinations by the Arizona Legislature. They do not depend on election delays, binding arbitration, untruthful secondary consumer picketing, or union access to employer facilities. Even if the district court were right as to the five provisions held unconstitutional, the legislative determinations remain that Arizona needs an agricultural labor board; that that board needs authority to conduct investigations, issue subpoenas, hold hearings, order reinstatement and back pay, and issue cease and desist orders concerning 19 uninvalidated unfair labor practices; that even though the bargaining representative cannot be chosen by the employees in a secret ballot election as determined by the Legislature, the collective bargaining process should be conducted according to law; that contracts resulting from collective bargaining are entitled to statutory protection; that physical threats against consumers should not be permitted; and so forth.

Even if all of the other errors were ignored, therefore, the parts of the statute not specifically invalidated by the district court's opinion should be allowed to continue to function.

CONCLUSION

The district court should never have considered this case at all. The constitutionality of the invalidated provisions depends on state law that has not been declared and facts that have not occurred.

Having considered the Act, the court has not only invalidated it in its entirety; it has also — unintention-

ally but unmistakably — called into constitutional question the election procedures of the National Labor Relations Act as they apply to a broad segment of industries under NLRB jurisdiction.

It is apparent that the district court committed many serious errors, any one of which presents a substantial federal question. Because some of these errors are so obvious, the most appropriate corrective is summary reversal. Absent reversal, review is required. The federal questions are substantial, and the interests of the people of Arizona in this statute are too important for its wholesale rejection by one court to be both the first and also the last word on the matter.

Moreover, the impact of the judgment appealed from reaches beyond Arizona. Congress having left agricultural employees outside the protection of the national labor laws, other states will find it necessary to fashion appropriate solutions to the vexing problems of labor strife in their farms and their fields. In setting about this difficult and important task, they are entitled to know whether their options are as limited as declared by the court below.

The unusual burden imposed on this Court by appeals from three-judge federal district courts will continue to diminish. We respectfully submit that during the interim, there is a special obligation to review those decisions as to which there will be no appellate review at all if this Court declines jurisdiction. This is especially true of a decision invalidating in its entirety a comprehensive effort of a state legislature to deal with a problem of unquestioned importance.

Probable jurisdiction should be noted or the judgment of the district court summarily reversed.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED FARM WORKERS NATIONAL UNION on behalf of itself and its members, et al., *Plaintiffs,* vs. BRUCE BABBITT, Governor of the State of Arizona, et al., *Defendants,* ARIZONA FARM BUREAU FEDERATION, an Arizona corporation, et al., *Intervenors.*	NO. CIV 72-445 PHX CAM OPINION AND ORDER

Before KILKENNY, Circuit Judge, CRAIG and MUECKE, District Judges

MUECKE, District Judge:

STATEMENT OF THE CASE

Plaintiffs filed this action for declaratory and injunctive relief together with an application for a three-judge court under the provisions of 28 U.S.C. § 1343, 42 U.S.C. § 1983, and 28 U.S.C. § 2201, et seq., seeking to have Arizona's Agricultural Employment Relations Act (AERA), A.R.S. §§ 23-1381, et seq., declared unconstitutional.

Plaintiffs in this action are the United Farm Workers National Union (U.F.W.), on behalf of itself and its members; Gustavo Gutierrez, an agent of the U.F.W. in the State of Arizona; Ruben Alaniz and Matilda Varela, farm workers, on behalf of themselves and all other farm workers; and Wendy Rose, an individual supporter of the U.F.W., on behalf of herself and all other similarly situated U.F.W. supporters.

Defendants are Bruce Babbitt, Governor of the State of Arizona; Jack La Sotta, Acting Attorney General; Bert Fleming, Treasurer; Raymond Long, Finance Commissioner; Gene Blake, William S. Borce, Jack Montgomery, Keith Walton, Jack McManus, Milton G. Sanders, individually and as members of the Arizona Agricultural Relations Board; and Theresa Bond, in her capacity as Executive Secretary of the Board.

The Arizona Farm Bureau Federation, the Arizona Grape Growers Association, the Vegetable Growers Association, all being Arizona corporations; and the Yuma Citrus Shipper's Association, and unincorporated association, all sought and were granted invervention in the suit on November 5, 1973.

Plaintiffs ask this Court to find that the Agricultural Employment Relations Act (AERA) violates the constitutional rights of the plaintiff U.F.W. and its members by restricting the exercise of their constitutional rights in several broad areas.

Provisions of the United States Constitution which plaintiffs claim are violated by the Act are the First and Fourteenth Amendments with respect to specific provisions of the Act, which provisions it is alleged violate freedom of speech and assembly and the due process and equal protection clauses of the Constitution.

In particular, plaintiffs' arguments deal with nine separate issues and at least as many provisions of the AERA in support of their contention that the AERA is unconstitutional. Those issues and the statutory provisions dealt with are: (1) A.R.S. § 23-1385(B)(6) and (7) [generally dealing with secondary boycotts as an unfair labor practice]; (2) A.R.S. § 23-1385(B)(8) [publicity directed at the ultimate consumer regarding nonuse of agricultural product as an unfair labor practice]; (3) A.R.S. § 23-1385(B)(12) [recognitional picketing as an unfair labor practice]; (4) A.R.S. § 23-1389 [employee representation and election procedures]; (5) A.R.S. § 23-1385(C) [access by union to workers on employer property]; (6) A.R.S. § 23-1382(1) [exclusion of stitchers and haulers from AERA]; (7) A.R.S. §§ 23-1384, 23-1385(B)(11), 23-1385(D) [elimination of "management rights" from bargaining process]; (8) A.R.S. §§ 23-1385(B)(13), 23-1393(B) [restriction and prohibition against striking and picketing]; and finally, (9) A.R.S. § 23-1392 [criminal penalties for violation of the Act].

The defendants have disputed the unconstitutional effects of the AERA as claimed by plaintiffs, and have consistently argued that this challenge fails to present a justifiable claim, both as to the substantiality of the federal questions presented by plaintiffs, and because they argue no case or controversy is presented to the Court. They also ask that this Court abstain from de-

ciding this case. As will become clear in this decision, the doctrine of abstention is not applicable to this case.

Defendants further claim that all testimony and other evidence received by this Court during the course of a four day nonjury trial on January 18, 19, 20, and 21, 1977, should be rejected by this Court as immaterial and completely conjectural and consisting of legal conclusions rather than factual evidence — even opinions and testimony given by the defendants' own experts.

As to this last point, defendants impose too restrictive a view on the admissibility and character of the evidence submitted in this case. Under Rules 701, 702, 703, and 704 of the Federal Rules of Evidence, much of the testimony of the experts relied upon by both parties is admissible either as of the type reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject, or of the kind of specialized knowledge that assists the trier of fact in determining facts in issue, ultimate or otherwise.

A pertinent example would be the opinions expressed by the experts of both sides as to time periods to be expected in the operation of various provisions of the Act, the length of growing seasons, facts growing out of their personal experiences with organizing unions, or in the operation of analagous statutes, i.e., the National Labor Relations Act or the California Agricultural Labor Relations Act.

Again as to this last point, i.e., testimony concerning operation of the analagous statutes, what is admissible as to this line of testimony is not an opinion of the expert as to the legal effect of the particular provision of the AERA, but rather, given a particular interpretation of a provision, a hypothetical if you will as to the legal effect of a provision, the opinion of the expert as to the practical effect of such an interpretation based on his previous experience and expertise *is* admissible *if* the legal premise on which the question is based is accepted by the court. Even if a hypothetical question as such is not asked, but it is obvious that the opinion of the expert is based on a certain interpretation of a statutory provision, which the court accepts as the appropriate interpretation, then the interpretation and resultant opinion testimony based on this interpretation is admissible. *Burlington Northern, Inc. v. Boxberger,* 529 F.2d 284, 286-87 (9th Cir., 1975); *United States v. School District 151, etc.,* 404 F.2d 1125, 1134-35 (7th Cir., 1968); *Confederated Tribes of Warm Springs Reservation v. United States,* 177 Ct.Cl. 184 (1966).

Evidence presented during the four day trial was introduced relative to A.R.S. §§ 1384, 1385(A)(5), 1385(B)(11), 1385(D), 1389, and on the plaintiffs' claim that the exclusion of stitchers and haulers and sixteen-year olds from the AERA, § 1382(1) and 1382(1)(g), was a violation of the Equal Protection Clause as well as a similar claim that exclusion of those farm workers who did not work for the same employer the previous calendar year from representation elections was likewise a violation of the Equal Protection Clause.

JURISDICTION

As a result of foundation questions asked of the witnesses, Caesar Chavez, Stanley Lubin, George W. Campbell, and James W. Cherry, this Court accepts all four as experts competent to give the opinions to which they testified.

It is the opinion of the Court that evidence need only be considered with respect to A.R.S. § 23-1389, the provision of AERA dealing with "Representations and elections," and with respect to A.R.S. § 23-1385(C). However, before setting forth the Court's findings as to these facts, the initial issue raised by defendants, namely, their allegation that this Court does not have jurisdiction because there is not a substantial federal question or a case or controversy presented to this Court by plaintiff's challenge to the AERA, will be settled.

Defendants in consistently espousing this view, that this Court does not have jurisdiction, have again emphasized in their argument that a single judge would have had jurisdiction to dismiss this case upon the Article III grounds and that this holds true even more so with the three-judge court.

The lack of jurisdiction motion was initially denied by the district judge prior to the empanelling of a three-judge court. Then the matter remained unresolved by this panel because of plaintiffs' contentions that the AERA was invalid on its face as overbroad and vague with respect to alleged infringement of constitutional rights. This, coupled with the criminal penalty provisions and the complexity of the case, made postponement of the jurisdiction question until after the trial a reasonable course of action. In so ruling we left Article III open as a threshold question and could proceed to a decision on the merits once jurisdiction was settled.

Plaintiffs' response to defendants' Article III attack is that such attack is not valid because of the "Stipulation Regarding Enforcement of the Act," filed by the parties, which reflects some seven suits have been filed against the plaintiff (U.F.W.) and its members and supporters based on sections of the AERA, and that as a result speech activities have been enjoined including handbilling and oral conversations — on three occasions by an *ex parte* temporary restraining order without notice or hearing.

In addition, plaintiffs argue that the Board itself has initiated charges against the U.F.W. which resulted in limitations on plaintiffs' rights. Finally, plaintiffs note that in *Roy's Liquor, et al., v. United Farm Workers* (set forth in the said stipulation), the Board apparently held they had no jurisdiction to consider challenges to the constitutionality of the Act.

From these examples cited by plaintiffs, and not controverted precisely by defendants, it must be concluded that this case is not hypothetical, abstract, or generalized.

As the court said in *Rescue Army v. Municipal Court*, 331 U.S. 549, 67 S.Ct. 1409 91 L.Ed. 1666 (1947), a case or controversy is created by a showing that one is injured by the statute's operation or that a construction of the statute to avoid the constitutional questions is impossible. Certainly a challenge for facial invalidity meets the *Rescue Army* test.

In addition to those matters contained in the stipulation, there is the matter of the criminal penalty provision of the statute, which reads as follows:

§ 23-1392. *Penalties.*

> Any person who willfully resists, prevents, impedes or interferes with any members of the board or any of its agents or agencies in the performance of duties pursuant to this article, or who violates any provision of this article is guilty of a misdemeanor punishable by a fine of not more than five thousand dollars, by imprisonment for not more than one year, or both. Provided, however, that none of the provisions of this section shall apply to any activities carried on outside the state of Arizona.

It would appear on the face of this provision of the AERA that it cuts across and covers the entire Act, not just a limited area where a criminal penalty might be acceptable. It says in plain English that it applies to "any person" and further to any person "who violates any provision of this article is guilty of a misdemeanor. . . ."

Considering the enormous variety of activities covered by the Act, and the fact that (as will be more fully discussed later) many of these involve First and Fourteenth Amendment constitutional rights, it is clearly a statutory provision so vague that men of common intelligence can only guess at its meaning. Conduct can only be prohibited and punished by certain, clear statutes, and such precision is necessary so that "the ordinary person can know how to avoid unlawful conduct." *U.S. v. Sullivan,* 332 U.S. 689, 68 S.Ct. 331, 92 L.Ed. 297 (1948). Even closer scrutiny is warranted where the regulation covers freedom of

speech. *Ashton v. Kentucky,* 384 U.S. 195, 86 S.Ct. 1407, 16 L.Ed. 2d 469 (1966).

In an area where application of a penal statute may restrict freedoms protected against state invasion by the Fourteenth Amendment's incorporation of the Bill of Rights, the U. S. Supreme Court has been constantly vigilant and protective of these rights.

> The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute, susceptible of sweeping and improper application. *NAACP v. Button,* 371 U.S. 415, 432-3, 83 S.Ct. 328, 9 L.Ed. 405 (1963).

The overbroadness and vagueness already discussed are compounded by the provision that the U.F.W. is bound by the acts of its agents and whether or not the acts so performed "were actually authorized or subsequently ratified shall not be controlling." A.R.S. § 23-1393(F). Since the Act restricts the U.F.W. and its agents, and provides criminal penalties for violation by any person, the U.F.W. could be subject to sanctions regardless of its relationship to the agent.

There is no way for anyone to guess whether criminal provisions will apply to any particular conduct, in advance, and it is clear that the statute is unconstitutionally vague and does not adequately define prohibited conduct and is, therefore, in violation of the due process clause of the Fourteenth Amendment. *Whitehall v. Elkins,* 389 U.S. 54, 88 S.Ct. 184, 19 L.Ed. 2d 228 (1967); *Keyesbian v. Board of Regents,* 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); *Elf-*

brandt v. Russell, 384 U.S. 11, 86 S.Ct. 1238, 16 L.Ed. 2d 321 (1966); *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed. 2d 1488 (1958); *Conally v. General Construction Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926).

Recently the U. S. Supreme Court considered the case or controversy issue in the context of a challenge to a criminal statute. In *Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed. 2d 201 (1973), the Supreme Court addressed the question whether a licensed physician's challenge to a Georgia anti-abortion statute presented a justiciable controversy. In that case, there was no record of a pending or threatened criminal prosecution and the Act had not been enforced against the plaintiffs. Still the court found a controversy did exist and reversed the lower court's dismissal saying:

> The physician is one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory options and conditions. The physicians-appellants, therefore, assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo criminal prosecution as the sole means of seeking relief. *Crossen v. Breckenbridge*, 446 F.2d 833, 839, 839-840 (6th Cir. 1971); *Poe v. Menghini*, 339 F.Supp. 986, 990-991 (Kan. 1972).

Throughout their arguments the intervenors and defendants have argued that there is no case or controversy here since no criminal prosecution has been commenced against the plaintiffs.

At the same time, as their memorandum reveals, they are also aware that were there pending criminal cases against the plaintiffs under AERA, this Court would hesitate to take jurisdiction for reasons of equity, comity, and federalism.

Yet courts have found case or controversies when criminal statutes were challenged as overbroad even before the acts went into effect or there had been any enforcement. *Wounded Knee Legal Defense/Offense Committee v. F.B.I.*, 507 F.2d 1281 (8th Cir. 1974); *Brown v. Brannon*, 399 F.Supp. 133, aff'd 535 F.2d 7249 (4th Cir. 1975); *Hjelle v. Brooks*, 377 F.Supp. 430 (D.Alas. 1974); *Stoner v. Miller*, 377 F.Supp. 177 (E.D.N.Y. 1974); *Associated Students, University of California at Riverside v. Attorney General of the United States*, 368 F.Supp. 11 (C.D. Cal. 1973); *Valley Health Systems v. City of Racine*, 369 F.Supp. 97 (E.D. Wisc. 1973); *Mortillaro v. State of Louisiana*, 356 F.Supp. 521 (E.D. La. 1972).

The significance of these cases is clear; that is, if plaintiffs are persons against whom the particular criminal statute directly operates, and whether they assert a sufficiently direct threat of personal detriment.

There can be no question that the plaintiffs in the present lawsuit are precisely those persons and organizations whose activity the penal statute was designed to regulate, and they have asserted a direct threat of personal detriment both through its past enforcement as well as the threat of its continued enforcement.

It is true that A.R.S. § 23-1392 of the AERA relating to penalties is severable, and that if so severed and declared invalid, the rest of the Act could stand as it is not dependant for its operation upon this section. However, it is sufficient in and of itself as being unconstitutionally invalid and void on its face to give this Court jurisdiction and create a case or controversy.

If the plaintiffs are correct in their contentions that many provisions of the AERA are unconstitutional and void on their face, then a substantial federal question exists as to the constitutional rights that are infringed upon by the AERA and this Court would have jurisdiction. However, if defendants maintain that any sections of the Act found to be unconstitutional are severable, then the remainder of the Act could stand as operable law.

Where it is not possible to separate that part of a law which is unconstitutional from the rest of the law, the whole law fails. *Lynch v. U.S.*, 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434 (1934); *Hill v. Wallace*, 259 U.S. 44, 42 S.Ct. 453, 66 L.Ed. 822 (1922); *Harrison v. St. Louis & S.F.R. Co.*, 232 U.S. 318, 34 S.Ct. 333, 58 L.Ed. 621 (1914); *Gherma v. State*, 16 Ariz. 344, 146 P. 494 (1915).

A law is void on its face if it does not aim specifically at evils within the allowable area of governmental control, but sweeps within its ambit other activities that constitute an exercise of protected expressive or associated rights. (see: "The First Amendment Overbreadth Doctrine" 83 Harv. L. Rev. 844 (1970).)

> A plausible challenge to a law as void for overbreadth can thus be made when (1) the protective activity is a significant part of the law's target, and

> (2) there exists no satisfactory way of severing the law's constitutional from its unconstitutional applications so as to excise the latter clearly in a simple step from the law's reach.

> In laws having these two characteristics, the usual approach of constitutional adjudication — gradually cutting away the unconstitutional aspects of a statute by invalidating its improper applications case by case — does not respond sufficiently to the peculiar vulnerable character of activities protected by the first amendment. For an "overbroad" law of the sort described here "hangs over [people's] heads like a Sword of Damocles." *Arnett v. Kennedy*, 416 U.S. 134, 231, 94 S.Ct. 1633, 40 L.Ed. 2d 15 (1974). That judges will ultimately rescue those whose conduct in retrospect is held protected is not enough, "for the value of a Sword of Damocles is that it hangs — not that it drops." The resulting deterrent to protected speech is not effectively removed if "the contours of regulation would have to be hammered out case-by-case and tested only by those hardy enough to risk criminal prosecution [or other sanctions] to determine the proper scope of regulation. *Dombrowski v. Pfister*, 380 U.S. 479, 487, 85 S.Ct. 1116, 14 L.Ed. 2d 22 (1965). The only solution, then, is to strike down such an overbroad law altogether. ... This result may be understood as an exception to the rule that individuals are not ordinarily permitted to litigate the rights of third parties, since an individual whose conduct may not itself be protected by the first amendment is awarded a judicial victory on the claim of a law's potential unconstitutional applications to the conduct of persons not before the court.

American Constitutional Law, Laurence H. Tribe, The Foundation Press, 1978.

CONCLUSIONS OF LAW

After consideration of the many-pronged attack made by plaintiffs on the constitutionality of the various provisions of the AERA, and the defendants' response thereto, this Court finds and concludes that the Agricultural Employment Relations Act, A.R.S. §§ 23-1381, et sequence, is unconstitutional in its entirety for the reason that A.R.S. §§ 23-*1385(B)(8)*, 23-*1392*, 23-*1393(B)(1)* are unconstitutional and void on their face, and A.R.S. §§ 23-*1385(C)* and 23-*1389* are likewise unconstitutional when considered in context with the testimony and other evidence presented, and these sections are found to be in violation of the First and Fourteenth Amendments to the Constitution of the United States and in violation of the freedom of speech and assembly provisions and of the due process and equal protection clauses with A.R.S. § 23-1393(B) also found to be in violation of the Seventh Amendment providing for right to trial by jury and with the rest of the Act falling by reason of its inseparability and inoperability apart from the provisions found to be invalid.

FINDINGS OF FACT

Turning now to the facts found by this Court to be pertinent to a consideration of the constitutionality of A.R.S. §§ 23-1385(C) and 23-1389.

The majority of agricultural employees as defined by the AERA are directly engaged in the planting, preparation and/or harvesting of row crops, field crops, tree fruits, and grapes. The greatest number of field workers employed by an agricultural employer are

employed during the peak of the harvest season. This peak period is that time when fifty percent or more of the highest number of agricultural employees employed at any time during the harvest season are employed.

Most of the agricultural employees in Arizona, about seventy-five to eighty percent of the total man-days worked each year, are employed in the growing and harvesting seasonal fruits and vegetables. Major crops in this category include lettuce (approximately twenty percent), citrus (approximately twenty-two percent), grapes and deciduous trees (approximately five to ten percent), vegetables, other than lettuce, including green onions, dry onions, carrots, cauliflower, broccoli, cabbage, etc. (approximately twenty percent), and cantaloupes (approximately five to ten percent).

The length of the harvest season and times of peak employment are for the most part very short. The great majority of the lettuce crop in Arizona is harvested in separate spring and fall harvests. The length of these harvest seasons for any particular employer ranges from four to six weeks within which there is a period of peak employment of only three to four weeks.

The grape harvest occurs once annually and lasts from four to six weeks with a period of peak employment of three to four weeks.

Cantaloupes are harvested in from three to seven weeks with a peak of only two to three weeks while the dry onion harvest for any single agricultural employer usually takes about two to four weeks.

The citrus harvest in Arizona lasts for ten to eleven months, approximately from September to mid-July. Green onions may be harvested for as long as ten months of the year. Even in these latter crops, citrus and green onions, there are factors which make the period of employment of particular workers for a specific employer considerably shorter than the length of the total harvest. Employers do not always have each successive crop ready for harvest at the end of the harvesting of the preceding crops. Therefore, the work is intermittent and employees often must switch employers. Many of the workers are migratory who must leave an area immediately after a harvest to find other employment. Many employees do not return to the same employer in a following year so that each year there is a substantial change in the work force.

Green onions also involve an industry where there is tremendous turnover because workers are paid on a daily cash basis and because many minors are employed.

In citrus, crews are constantly moved from employer to employer throughout the harvest season picking only intermittently for any particular employer for from a few days to a few weeks.

If an election is to be held so that a majority of employees of a particular grower can participate, such an election must be held during the period of peak employment. To accomplish this, the law should assure that an election can be petitioned for during such peak periods, and that the procedures for holding elections does [sic] not extend in time beyond the period of peak employment.

Any labor organization seeking to organize Arizona agricultural workers employed in these industries must by reason of provisions of the AERA relating to the representation and election provisions of the AERA, and because of the very nature of the organizational process based on previous experience with analogous statutes, e.g., National Labor Relations Act and the California Agricultural Labor Relations Act, take certain periods of time to accomplish certain organizational goals.

For example, it takes approximately three to six weeks for a union to gather authorization cards to be submitted with a petition for a representation election. Activities which must be carried out by the union during this time include locating all the various fields of an employer, identifying his employees, contacting those employees, and informing and persuading them to sign authorization cards. This cannot be done until the harvest season has begun since there is a substantial turnover in employees from year to year and it is impossible to determine who will work for an employer until that person is actually found in the field. Also to protect employees from possible empolyer retaliations, organizing must be done at a time relatively near the election.

It is usually within an employer's power to delay the process of obtaining sufficient authorizations by employing coercive tactics to discourage union activities among his employees.

Much of the work of reaching agricultural employees must be done on the employer's property, since most agricultural employees are migrants with no permanent residence in the area and live in labor camps on the employer's premises.

The election procedures of the AERA are virtually identical to those of the National Labor Relations Act which, in a contested election, requires from six to seven weeks for completion.

The election provisions of the AERA call for a Board investigation of the petition, the setting and holding of a pre-election hearing upon the demand of the employer, decision of issues raised at the hearing, and granting the employer ten days to provide a list of employees to the Board and the union.

The experience of the plaintiff U.F.W. in participating in over 400 elections in California in the agricultural industry was that it took from three to six weeks before petitions could be filed. Under NLRB experience the hearing is not held until from fourteen to twenty-one days after the petition is filed.

The six to seven week period between the filing of a petition and the holding of an election will be longer than many of the seasons of peak employment. When this period is added to the three to six weeks of work which must be done before a petition can be filed, the entire process cannot take place before the majority of the employees finish their work and leave their place of employment.

Experience under both the N.L.R.A. and in California employer-employee situations in the agricultural industry, has shown that some employers do utilize such coercive and intimidating tactics during elections that both the NLRB and the California Board have found that even after remedial action for unfair labor practices, it was impossible to hold a fair, uncoerced election.

In such situations it has been determined that the only way to preserve the employees' right to collective bargaining was to issue orders to bargain to the employer, absent an actual certification through a secret ballot election.

Absent such power to issue such bargaining orders, the Board, acting pursuant to the AERA, would be without adequate remedy to protect employee rights to collective bargaining. Since the AERA prohibits the Arizona Board from issuing such an order requiring an employer to bargain with a union, unless that union is certified through an election, the AERA encourages employers to commit those types of unfair labor practices which result in election coercion and in turn to a "no-union" vote. Such a practice could be engaged in year after year, effectively delaying any bargaining.

REPRESENTATION AND ELECTION PROCEDURES

Having stated these facts, our consideration turns naturally to that provision of the Act most important to a consideration of its constitutionality. This is A.R.S. § 23-1389 (employee representation, recognition, and election procedures). For a full analysis of this point as well as an exhaustive analysis of the AERA, see: "State Regulation of Agricultural Labor

Relations — The Arizona Farm Labor Law — an Interpretive and Comparative Analysis." Warren H. Cohen, Jonathan Rose. Law and the Social Order, 1973, p. 313 through 431, at 322.

The stated legislative purpose of the Act as enunciated in its "Declaration of Policy," A.R.S. § 23-1381, is said to be:

> . . . the policy of this state that agricultural employees shall be free to organize, to take concerted action, and through representatives of their own choosing enter into collective bargaining contracts establishing their wages and terms and conditions of employment; . . ."

Such a stated policy is but a recognition of the First Amendment right to free speech, to assemble peaceably, and the due process right of all in America who desire to do so to participate and retain membership in a union. *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); *N.A.A.C.P. v. Alabama, ex rel. Paterson*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed. 2d 1488 (1958); *Hagne v. CIO*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1414 (1939); *NLRB v. Jones and McLaughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed 893 (1937); *Lontine, et al., v. Van Cleave*, 483 F.2d 966 (10th Cir. 1973); *American Federation of State, County & Municipal Employees v. Woodward*, 406 F.2d 137 (8th Cir. 1969); *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968); *Thomas v. Collins*, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 2d 430 (1945). See also "A Preliminary Survey of the Arizona Farm Labor Act," Robert A. Kerry, *Arizona Law Review*, Vol. 14, No. 4, p. 766 at 801.

The section in question reads as follows:

§ 23-1389. *Representatives and elections*

A. Representatives selected by a secret ballot for the purposes of collective bargaining by the majority of the agricultural employees in a unit appropriate for such purposes shall be the exclusive representatives of all the agricultural employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment. If ratification of any such contract is required, the right to vote in such ratification shall be limited to the employees in the bargaining unit. Any individual agricultural employee or a group of agricultural employees may at any time present grievances to their agricultural employer and have such grievances adjusted, without the intervention of the bargaining representative, if the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect. The bargaining representative shall be given opportunity to be present at such adjustment.

B. The board shall decide in each case whether in order to ensure to employees the fullest freedom in exercising their rights the unit appropriate for the purposes of collective bargaining shall consist of either all temporary agricultural employees or all permanent agricultural employees of an agricultural employer working at the farm where such employer grows or produces agricultural products or both. In making unit determinations the extent of a union's extent of organization shall not be controlling. Principal factors should be the community of interest

between employees, same hours, duties and compensation, the administrative structure of the employer and control of labor relations policies.

C. The board shall investigate any petition, and if it has reasonable cause to believe that a question of representation exists shall provide for an appropriate hearing upon due notice, when such petition has been filed in good faith in accordance with such regulations as may be prescribed by the board:

1. By an agricultural employee or group of agricultural employees or any individual or labor organization acting in their behalf alleging that thirty per cent or more of the number of agricultural employees in the unit in question either wish to be represented for collective bargaining and that their employer declines to recognize their representative or assert that the individual or labor organization which has been certified or is being currently recognized by their employer as the bargaining representative is no longer a representative.

2. By an agricultural employer alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative or that an individual or labor organization which has previously been certified as the bargaining representative is no longer a representative.

D. If the board finds upon the record of such hearing that a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof. If a second labor organization files a petition for an election alleging that

thirty per cent or more of the employees in the unit in question desire to be represented by that labor organization, then the board shall require that the names of both labor organizations shall appear on the ballot. In any election the voters shall be afforded the choice of "no union". If in a representational election where more than one union is on the ballot, and none of the choices receives a majority vote, a second election shall be held. The second election shall be between the union receiving the highest number of votes and "no union". In any election a labor organization shall obtain a majority of all votes cast in that election in order to be certified as the bargaining representative of all the employees in that unit.

E. In determining whether or not a question of representation exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought. In no case shall the board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with § 23-1390.

F. Within five days of receipt of such a petition, the agricultural employer may file a challenge to such petition on the ground that the authorization for the filing of such petition is not current or that such authorization has been obtained by fraud, misrepresentation or coercion. Such petition shall not act to stay the election proceeding but if it is there-

after determined that the authorizations are not current or obtained by fraud, misrepresentation or coercion the petition will be dismissed.

G. No election shall be directed or conducted in any bargaining unit or any subdivision thereof within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the board shall find are consistent with the purposes and provisions of this article in any election conducted within three months after the commencement of the strike. Any agricultural employee who is found to have sought or accepted employment only for the purpose of affecting the outcome of an election shall not be eligible to vote in an election conducted pursuant to the provisions of this article for a period of twelve months from the date of that election.

H. Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the board.

I. The agricultural employer, within ten days after an election is directed by the board or a consent election agreement is approved by the board and on request of the board, shall furnish to the board a list of agricultural employees in the bargaining unit who are qualified to vote, and such a list shall be made available to the organizations or other interested employees involved in the election.

J. Upon the filing with the board, by thirty per cent or more of the agricultural employees in a bargaining unit covered by a certification or by an agreement between their employer and a labor organization made pursuant to § 23-1385, of a petition alleging the desire that such representation authority be rescinded, the board shall conduct an election by secret ballot of the employees in such unit and certify the results thereof to the labor organization and to the employer.

This section of the AERA is the threshold over which employees must pass if they desire to exercise their constitutional right to " . . . organize . . . take concerted action . . . through representatives of their own choosing. . . ."

If this section fails, the rest of the Act must fail, since most of the use of the Act would apply only if farm workers were initially free to organize and not if the exercise of such a constitutional freedom of assembly were made impossible.

Essentially, this provision of the Act must be found constitutionally invalid as being in violation of the First and Fourteenth Amendments to the Constitution, because of the excessive length of the procedures permitting delays of unit representation elections coupled with the seasonal nature of agricultural labor.

The constant flux of workers to job sites, the broken routines, the mobility and interchange with different employers, and the short span of working periods during peak employment periods when the majority of workers in a proposed unit are employed by a grower,

make it impossible for the Agricultural Employment Relations Board to conduct a timely election to effect the purpsoes of the Act.

Representation and recognition by the union, and the requirement that an employer bargain with the union, can only be achieved if the union is chosen to represent the employees through the election procedures set out in the A.R.S. § 23-1385(A)(5). Before an election can be held, the union must first demand and be denied recognition by the employer. A.R.S. § 23-1389(C)(1). There is no time set out in the law within which the employer must answer this request.

If the employer does not petition for an election, and denies a request for recognition, then the union must petition for an election showing that at least thirty percent of the employees in the unit wish to be represented by the union. A.R.S. § 23-1389(C)(1). If the AERA Board has reasonable cause to believe that a sufficient number of workers desire to have a union to represent them to justify an election, it will set a pre-election hearing. Again no time period is provided in the Act for how soon the Board must act. Since time for such notice is not provided, the general application of the Arizona Administrative Procedure Act stamps a twenty day period (A.R.S. § 41-1009) on how soon the hearing will be held.

If at the hearing, the Board determines there is a question of representation, it will direct an election by secret ballot. Again there is no provision setting the time within which the election must be held.

Once the Board has fixed the time for a union election, the employer has ten days to submit to the Board a list of his employees eligible to vote. A.R.S. § 23-1389(I). Then the election must be by secret ballot. If the union wins a majority of the votes cast, it will be certified by the Board as the representative for that unit and the employer will be required to bargain collectively with the union. § 23-1385(A)(5); see also § 23-1385(D).

The Board is directed by the AERA to form the unit from either all "permanent" employees, all "temporary" employees or both. A.R.S. § 23-1389(B). Permanent employees are defined as those "over sixteen years of age who . . . [have] . . . been employed by a particular agricultural employer for at least six months during the preceding calendar year." A.R.S. § 23-1382(1).

The Board is also directed to form the bargaining unit from employees "working at the farm." A worker could thus be a "permanent" employee but still be excluded from voting because while having worked for the employer for at "least six months during the preceding calendar year," he was not employed at the time of the election (and we take calendar year to have it plain meaning of being a year extending from January through December so that this provision clearly means that a worker must have been employed during the twelve months preceding January 1 of the year in which the election is held).

A temporary employee is defined as "over sixteen years of age . . . employed by a particular agricultural employer and who has been so employed during the preceding calendar year." A.R.S. § 23-1382(1).

Again, a worker not currently employed even though he worked the previous calendar year for the employer could not vote.

In any event, it is also clear from these provisions that many other migratory workers could not vote, even though presently employed, simply because they had not worked for the employer in a particular unit, either for six months or at any time during the preceding calendar year — the practical effect being that a particular worker must be employed during two successsive harvests before being entitled to vote.

These categories of employees eligible to vote set forth in the Act, would appear to be so defined as to preclude a significant and substantial number from participating in the collective bargaining process, from selecting representatives of their own choosing, given the migratory and transitory nature of agricultural employment.

A second and most significant consequence of determing the unit solely on the basis of the eligible employees as defined by the Act, is that an election in any unit will be a bar to another election for twelve months. A.R.S. § 23-1389(G).

Groups of workers may thus be hired for the same unit at different times of the year, and yet an election among one group will bar an election by a group hired later in the year. An employer could, for example, respond to a petiton for an election filed by a small

minority of his permanent, year-round employees, and if they should vote for no-union, then no matter how many hundreds of thousands of employees that employer hires for that unit, thereafter they are barred from holding another election for twelve months — clearly an absolute frustration of their right of free association.

Defendants have argued that even if an election were held before or after the peak period, the plaintiff union could object on the grounds that a non-representative electorate selected the collective bargaining representative. But here again, as if in anticipation of this kind of reaction, A.R.S. § 23-1385(B)(12) prohibits picketing or boycotting "(b) Where within the preceding twelve months a valid election under § 23-1389 has been conducted." or "(c) Where a petition has been filed under § 23-1389."

As noted in the earlier findings, another difficulty arising out of a procedure which makes an election (aside from dubious consent by an employer) the sole procedure for establishing union recognition and representation is that the ballot procedure is subject to disruption by the employer and thus could effectively frustrate any such recognition or representation ever being achieved.

This problem has been well recognized by the courts, and where an election is not a feasible alternative, the NLRA and the courts have recognized the validity of informal methods of designating a union for ordering collective bargaining and an essential method of preserving the rights of employees. *Linden Lumber Division v. UNLRB*, 419 U.S. 301, 95 S.Ct. 429, 42 L.Ed. 2d 465 (1974); *N.L.R.B. v. Gessel* [*sic*] *Packing*

Co., 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed. 2d 547 (1969); *Bishop v. NLRB*, 502 F.2d 1024 (5th Cir. 1974); *NLRB v. Big Three Industires*, 497 F.2d 43 (5th Cir. 1974); *NLRB v. Kaiser Agr. Chem. Div. of Kaiser A & C Corp.*, 473 F.2d 374 (5th Cir. 1973); *J. P. Stevens & Co., Inc., Gubistan Division v. NLRB*, 441 F.2d 514 (5th Cir. 1971); *NLRB v. Drives Inc.*, 440 F.2d 354 (7th Cir. 1971).

The Ninth Circuit, in following *NLRB v. Gessel* [*sic*] *Packing Co., supra*, noted that without ultimate authority to order collective bargaining regardless of election results, the statutory procedures themselves become an aid to an employer's attempt to prevent unionization. *NLRB v. L.B. Forster Co.*, 418 F.2d 1 (9th Cir. 1969).

Thus the absence in the AERA of any feasible alternative to a secret ballot election is in effect a condonation and an encouragement to intentional interference by the employer in the election process which could effectively prevent any meaningful election from ever being held, again frustrating the right to free assembly and association.

We next consider additional bases for conferring jurisdiction upon this Court, namely, whether there is any other section or sections of the AERA that are constitutionally invalid on their face so that there is a further substantial federal question presented.

We find this to be true of three sections: A.R.S. § 23-1385(B)(8), A.R.S. § 23-1385(C), and A.R.S. § 23-1393(B).

CONSUMER PUBLICITY

The first deals with consumer publicity and reads in pertinent part:

§ 23-1385. *Unfair labor practices.*

B. It shall be an unfair labor practice for a labor organization or its agents:

8. To induce or encourage the ultimate consumer of any agricultural product to refrain from purchasing, consuming or using such agricultural product by the use of dishonest, untruthful and deceptive publicity. Permissible inducement or encouragement within the meaning of this section means truthful, honest and non-deceptive publicity which identifies the agricultural product produced by an agricultural employer with whom the labor organization has a primary dispute. Permissible inducement or encouragement does not include publicity directed against any trademark trade name or generic name which may include agricultural products of another producer or user of such trademark, trade name or generic name.

This provision of the AERA deals specifically with "truthful, honest and undeceptive publicity" and says if publicity is not of this character, it is an unfair labor practice. This section is no doubt intended to prohibit what is commonly referred to as consumer boycotts to be achieved by handbilling, picketing, orally, and other mediums of communication customarily employed by labor organizations.

First, it specifically prohibits inducing or encouraging an ultimate consumer to refrain from purchasing particular agricultural products "by the use of dishonest, untruthful and deceptive publicity." This section goes on to define permissible inducement "as truthful, honest, and nondeceptive publicity which indentifies the agricultural product produced by an agricultural employer with whom the labor organization has a primary dispute."

Plaintiff argues (1) that the section unconstitutionally restricts speech activity because it makes all but truthful, honest, and nondeceptive publicity an unfair labor practice, and subjects a person or organization guilty of such practice to criminal penalties for violation where determination of "truth" is left to be decided by a tribunal after the utterance and thus creates a drill [sic] on the exercise of First Amendment rights, and that (2) the section's limitation on inducement by a union to products produced by the agricultural employer with whom the union has a primary dispute restricts unconstitutionally the right of nonemployees to communicate.

As to the first requisite, the U.S. Supreme Court has held on many occasions that truthfulness is not a prerequisite to First Amendment protection.

In *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed. 2d 1 (1971), the court said:

> It is elementary of course that in a case of this kind the courts do not concern themselves with the truth or validity of the publication. *Under Near v. Minnesota*, 283 U.S. 697, the injunction, so far as it poses a prior restraint on speech and

> publication constitutes an impermissible restraint on first amendment rights.

Again in *N. Y. Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964), the court also indicated that First Amendment protections apply to other than just truthful statements.

> Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth — whether administered by judges, juries or administrative officials — and especially one that puts the burden on proving the truth to the speaker. *Cf. Speiser v. Randall*, 357 U.S. 513, 78 S.Ct. 1332, 525-26, 2 L.Ed. 2d 1460, 1472 (1958). The constitutional protection does not turn upon the "truth, popularity, or social utility of the ideas and beliefs which are offered." *NAACP v. Button*, 371 U.S. 415, 445, 83 S.Ct. 328, 9 L.Ed. 2d 405 (1963).
>
> That erroneous statement is inevitable in free debate and that it must be protected if the freedoms of expression are to have the "breathing space" that they "need to survive" (citing case) was also recognized by the Court of Appeals for the District of Columbia Circuit in *Sweeney v. Paterson*, 76 U.S. App. D.C. 23, 24, 128 F.2d 457, 458, cert. denied 317 U.S. 678, 63 S.Ct. 160, 87 L.Ed. 544 (1942).

See also *Vanesco v. Schwartz*, 401 F.Supp. 87 (D.C.N.Y. 1975), aff'd without opinion 423 U.S 1041, 96 S.Ct. 763 (1976). The court in *Vanesco* held that a statute prohibiting "deliberate misrepresentations" and regulations prohibiting "misrepresentations" in political campaigns, which on the face of the statute

were not based on a finding of actual malice, was an overbroad infringement upon First Amendment rights and was unconstitutional on its face.

The statute here involved likewise contains no intent requirement, and in fact is even broader since it is not limited to "deliberate" misrepresentation.

Although defendants, as to this particular provision and with so many others, are always proposing the narrowest interpretation possible, and suggesting that this is the way that this, and many other provisions, should be interpreted to save constitutionality of a statute, yet, as has been said, where First Amendment rights are involved, this prohibition in this section of the statute involving as it does a prior restraint on free speech, must be narrowly drawn, and the speaker should not be "chilled" by the potential that some interpretation of his expression concerning which he has no knowledge may make his statement "untruthful." *Gooding v. Wilson,* 405 U.S. 518, 92 S.Ct. 1003, 31 L.Ed. 408 (1972); *Pickering v. Board of Education,* 391 U.S. 563, 573-74, 88 S.Ct. 1731, 20 L.Ed. 2d 811 (1968); *Garrison v. Louisiana,* 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed. 2d 125 (1964); *NAACP v. Button,* 371 U.S. 415, 433, 83 S.Ct. 328, 9 L.Ed. 2d 405 (1963) *Cafeteria Workers Local 302 v. Angelos,* 320 U.S. 293, 295, 64 S.Ct. 126, 88 L.Ed. 58 (1943); *Chaplinsky v. New Hampshire,* 315 U.S. 568, 572, 62 S.Ct. 766, 86 L.Ed. 1031 (1942); *Cantwell v. Connecticut,* 310 U.S. 296, 310, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

The next questionable part of this section, namely, A.R.S. § 23 1385(B)(8), is that which limits consumer picketing by the union solely to situtations in which the union has a primary dispute with a particular

grower and the picket signs must identify that grower. However, if that particular grower with whom the union has a primary dispute sells to a trade association which utilizes a trade name on the products sold which include the particular grower's product, the union is forbidden in its consumer picketing from referring to that trade name.

Defendants argue that this language is necessary to protect a grower not involved in a dispute with the union who happens to deal in the same product bearing the same trade name, as the grower with whom the union does have a dispute.

However, it must be noted that A.R.S. § 23-1382.6 is the only definition of "dispute," and it is there defined as "... any controversy between an agricultural employer and his agricultural employees...." Construing A.R.S. § 1385(B)(8) in light of A.R.S. § 23-1382.6 means that a labor organization is permitted to conduct picketing against a particular employer only if that employer's employees have a controversy over terms and conditions of employment.

In *AFL v. Swing,* 312 U.S. 321, 61 S.Ct. 568, 85 L.Ed. 855 (1941), the Illinois Supreme Court had enjoined picketing by a labor union on the ground that there was no dispute between the employer and his immediate employees. The United States Supreme Court reversed, however, holding that an injunction was inconsistent with "the right to free discussion" and therefore unconstitutional. It follows that if a primary dispute is not required for primary picketing, it cannot be made a requirement for secondary picketing. The same "right to free discussion" is abridged, and it is not outweighed by the State's interest in pro-

tecting the secondary employer since the existence of a primary dispute has no relation to whether the secondary employer is being subjected to economic coercion. See also: *Baldwin v. Arizona Flame Restraurant*, 82 Ariz. 385, 313 P.2d 759 (1957), where the Arizona Supreme Court held unconstitutional A.R.S. § 23-1322 which required a "bona fide dispute regarding wages and working conditions" between an employer and a majority of his employees as a prerequisite to lawful picketing. See also: *NLRB v. Fruit Packers Local 760*, 377 U.S. 58, 84 S.Ct. 1063, 12 L.Ed. 2d 129 (1964).

This section of A.R.S. § 23-1385(B)(8) therefore is invalid on its face as a violation of the free speech provison of the First Amendment to the Constitution.

ACCESS BY UNION REPRESENTATIVES

Turning next to a consideration of § 23-1385(C) which in pertinent part reads as follows:

> C. . . . No employer shall be required to furnish or make available to a labor organization, and no labor organization shall be required to furnish or make available to an employer, materials, information *time*, or *facilities* (emphasis added) to enable such employer or labor organization, as the case may be, to communicate with employees of the employer, members of the labor organization, its supporters, or adherents.

This provision clearly states that an employer of migrant farm workers does not have to provide a time or place when and where the union can communicate with his workers, and it also means that the employer does not have to allow the union to come upon his

property. The provision provides a positive tool for a grower employer to keep any one and everyone away from his property.

Given the fact, as shown by testimony and other evidence and really not disputed by defendants that the vast majority of farm workers are migratory and generally reside in areas or labor camps located on property owned by the employer, this section must fall because it constitutes an unconstitutional restriction on the First Amendment exercise of free speech because of private property interests.

Even defendants agree that there must be an accommodation between organizational rights and property rights by citing *Central Hardware Co. v. NLRB*, 407 U.S. 539, 92 S.Ct. 2238, 33 L.Ed. 2d 122 (1972), but no such accommodation is permitted by this section of the statute.

Beginning with *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946), which held that ownership of property didn't always mean absolute domain and that private property was *not* per se immune from a constitutional protection of people on or entering upon property, the courts continued to assert this same principle.

In *Peterson v. Talisman Sugar Co.*, 478 F.2d 73 (5th Cir. 1973), the court found that a labor camp was more analagous to the traditional "company town" than shopping centers discussed in *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 88 S.Ct. 1601, 20 L.Ed. 2d 603 (1971); *Hudgens v. NLRB*, 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed. 2d 196

(1976); and *Lloyd Corp. v. Tanner,* 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed. 2d 131 (1971) relied upon by defendants.

In the latter cases, the Supreme Court upheld restrictions on exercise of First Amendment rights because of private property interests.

In the company town situation, pertinent to the facts of this case, the court in *Marsh v. Alabama, supra,* found that there was nothing in the company town, except for mere title in a corporation, which would justify treating it differently from any other municipal center.

The court in *Peterson v. Talisman Sugar Co., supra,* went on to hold that a labor camp was a functional equivalent of a municipality and the company had to accommodate its property rights to the extent necessary to allow the free flow of ideas and information between the union and the migrant workers. See also: *Illinois Migrant Council v. Campbell Soup Co.,* 478 F.2d 73, 82-83 (5th Cir. 1973); *United Farm Workers Union, AFL-CIO v. Mel Finerman Co.,* 364 F.Supp. 326 (D.Colo. 1973); *Francheschina v. Morgan,* 346 F.Supp. 833 (S.D. Ind. 1972); *Folgueras v. Hassle,* 331 F.Supp. 615 (W.D. Mich. 1971); "First Amendment and the Problems of Access to Migrant Labor Camps After Lloyd Corporation v. Tanner," 61 Cornell L.Rev. 560 (1976).

Defendants argue that this section makes no reference to and does not restrict the rights of employees to communicate with other employees during non-work time in non-work areas, and that the section restricts only labor organizations. They say this section doesn't deny access, it just says that the employer doesn't

have to furnish facilities and the union "is not prohibited, in the exercise of free speech, from going into non-work areas on the property at reasonable times for legitimate, peaceful purposes."

However, as to alternative means of communciation, A.R.S. § 23-1389(I) provides that an employer need only provide a list of names of the people working for him, and this, taken in conjunction with A.R.S § 23-1385(C)'s provision which states that no employer shall be required to furnish or make available information to enable a union to communicate with employees, effectively deprives the union of any alternative form of communication due to the migrant nature of the workers.

Defendants also attempt to make a distinction between "furnishing" and "denying access." They seem to argue that these are always two separate acts, one an affirmative and the other negative, and that the Act only applies to one, namely "furnishing." In fact they would appear to be the same activity. If the grower doesn't have to "furnish facilities" that clearly means he doesn't have to provide a time or place when the union can communicate with his workers, and thus also means that he does not have to allow them to come onto his property.

Defendants also seek to distinguish between employee and non-employee union organizers, contending that the former has rights of access while the latter does not. Aside from the dubious value of this distinction in constitutional terms, the words of the statute are not so limited and an employee who is a union organizer is considered under normal agency principles to be an agent of the union, and the employer would

not be under any obligation to allow time or facilities for him either.

In brief then, an employer does not have to grant access to facilities which he does not have to furnish.

Given the clearly established rights of communication and organization, this section of A.R.S. § 23-1385(C) is constitutionally defective because it prohibits too broad a scope of activity, both protected and unprotected, involving freedom of association and speech.

COURT JURISDICTION

We turn finally to A.R.S. § 23-1393(B) which in pertinent part reads:

§ 23-1393. *Court jurisdiction*

. . .

. . .

B. In the case of a strike or boycott, or threat of a strike or boycott, against an agricultural employer, the court may grant, and upon proper application shall grant as provided in this section a ten-day restraining order enjoining such a strike or boycott, provided that if an agricultural employer invokes the court's jurisdiction to issue the ten-day restraining order to enjoin a strike as provided by this subsection, said employer must as a condition thereto agree to submit the dispute to binding arbitration as the means of settling the unresolved issues. In the event the parties cannot agree on an arbitrator within two days after the court awards a restraining order, the court shall appoint one to decide the unresolved issues. Any agricultural employer shall be entitled to injunctive relief accorded by Rule 65 of the Arizona Rules of Civil Procedure upon the filing of a verified petition showing that his agricultural employees are unlawfully on strike or are unlawfully conducting a boycott, or are unlawfully threatening to strike or boycott, and that the resulting cessation of work or conduct of a boycott will result in the prevention of production or the loss, spoilage, deterioration, or reduction in grade, quality or marketability of an agricultural commodity or commodities for human consumption in commercial quantities. For the purpose of this subsection, an agricultural commodity or commodities for human consumption with a market value of five thousand dollars or more shall constitute commercial quantities.

This section provides a unique remedy to the employer. On his verified petition to the Court, alleging that his employees are unlawfully on strike and alleging a prevention of production or loss or spoilage of his crop, several things happen:

1. As a condition for the order he, the employer, must "agree" to submit the issues to binding arbitration;

2. If the parties within two days after the issuance of the order cannot agree upon an arbitrator to decide the issues, the Court *"shall"* appoint one "to decide the unresolved issues."

The effect of the section is apparent, if the union should insist under the "employees' rights" section (A.R.S. § 23-1383) that they have a right to bargain concerning an issue which is contrary to that of the employer's position under the "management rights" sections (A.R.S. §§ 23-1384, 23-1385(B)(11), 23-1385(D), then any resultant strike by the union in support of their position can be unilaterally deemed "unlawful" by the employer who can, without the consent of the union, submit the dispute to binding

arbitration by an outsider. The act then mandates the Court to submit the matter to a stranger and deprives the Court of further jurisdiction to hear the matter on its merits.

Such unilateral compulsory arbitration constitutes a clear denial of due process under the law for when the effect of statutes has been to coerce parties to submit to arbitration, without agreement or assent on their part to do so, the courts have declared them unconstitutional [*Dorchy v. Kansas*, 264 U.S. 286, 44 S.Ct. 323, 68 L.Ed. 686 (1924); *Chas. Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522, 43 S.Ct. 630, 67 L.Ed. 1103 (1923); *Graves v. Northern P. R. Co.*, 5 Mont. 556, 6 P. 16 (1885)] as depriving parties of liberty and property without due process of law, 55 A.L.R. 2d 445, 510, or as depriving parties of constitutional right to a trial by jury. *Re Smith*. 381 Pa. 223, 112 A.2d 625, app. dismissed, 350 U.S. 858, 76 S.Ct. 105, 100 L.Ed. 762 (1955).

Furthermore, under Arizona law pertaining to arbitration which contains procedures for arbitration and means of review, § 12-1517 makes such article to have "... no application to arbitration agreements between employers and employees or their respective representatives."

We therefore strike down this section of the statute, A.R.S. § 23-1393(B), as unconstitutional in violation of the due process clause of the Fourteenth Amendment to the Constitution and the Seventh Amendment providing for right to trial by jury.

CONCLUSION

To conclude, we find that the fatal flaw in the Arizona Agricultural Employment Relations Act consists of the inability of agricultural employees to organize in the first instance to exercise their right of freedom of speech and assembly, as we indicated in striking down A.R.S. § 23-1389.

This, coupled with the other sections struck down, results in a complete perversion of the expressed intent of the Legislature to allow agricultural employees to "be free to organize, take concerted action and, through representatives of their own choosing, enter into collective bargaining agreements establishing their wages and terms and conditions of employement. . . ."

The limitation on this right to organize is frustrated by legislated delay, the inability to communicate with employees at the employer's facilities, the unlawful proscription on free speech, the right to concerted action in the form of a lawful strike clearly threatened by the employer's unilateral action in having the issue determined by a stranger through compulsory arbitration which in turn takes away the right to a trial by jury, and finally by the imposition of vauge and ambiguous criminal sanctions. In the light of these rulings there is obviously no need to rule on plaintiffs' other contentions including the claimed equal protection violation.

In light of the findings of this Court,

IT IS ORDERED that a permanent injunction shall issue enjoining defendants from applying or enforcing any of the provisions of A.R.S. § 23-1381, et seq.

DATED this 20th day of March, 1978.

United States Circuit Judge

United States District Judge

United States District Judge

CRAIG, D. J. concurring:

In this case I would have preferred to invoke the doctrine of abstention in order that the Supreme Court of Arizona might first express its opinion with respect to the constitutionality of a law established by the Arizona State Legislature. The majority has elected to consider the case on its merits.

I, therefore, concur in the result, although I would have used fewer words to reach it.

DATED this 19th day of April, 1978.

United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

UNITED FARM WORKERS NATIONAL UNION on behalf of itself and its members, et al., *Plaintiffs,* vs. BRUCE BABBITT, Governor of the State of Arizona, et al., *Defendants,* ARIZONA FARM BUREAU FEDERATION, an Arizona corporation, et al., *Intervenors.*	NO. CIV 72-445 PHX CAM JUDGMENT

This action came on for trial before the court, the Honorable John F. Kilkenny, Circuit Judge; the Honorable Walter E. Craig, District Judge; and the Honorable C. A. Muecke, District Judge, presiding, and the pleadings and memoranda having been considered and the issues having been duly heard and a decision having been duly rendered, and

The Court having found that the Agricultural Employment Relations Act, A.R.S. §22-1381, et sequence, is unconstitutional in its entirety for the reason that A.R.S. §§23-1385(B)(8), 23-1392, 23-1393(B)(1) are unconstitutional and void on their face, and A.R.S. §§23-1385(C) and 23-1389 are likewise unconstitutional when considered in context with the testimony and other evidence presented, and these sections hav-

ing been found to be in violation of the First and Fourteenth Amendments to the Constitution of the United States and in violation of the freedom of speech and assembly provisions and of the due process and equal protection clauses with A.R.S. §23-1393(B) also found to be in violation of the Seventh Amendment providing for right to trial by jury and with the rest of the Act falling by reason of its inseparability and inoperability apart from the provisions found to be invalid,

IT IS THEREFORE ORDERED that judgment is hereby rendered in favor of plaintiffs herein in accordance with the opinion of the Court and a permanent injunction is hereby entered preventing enforcement by defendants herein of A.R.S. §§23-1381, et seq.

DATED this 19th day of April 1978.

_____
United States Circuit Judge

_____
United States District Judge

_____
United States District Judge

APPENDIX C

JOHN A. LaSOTA, JR.
The Attorney General

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

UNITED FARM WORKERS NATIONAL UNION on behalf of itself and its members, et al., *Plaintiffs,* vs. BRUCE BABBITT, Governor of the State of Arizona, et al., *Defendants,* ARIZONA FARM BUREAU FEDERATION, an Arizona corporation, et al., *Intervenors.*	NO. CIV 72-445 PHX CAM NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Defendants, Bruce Babbitt, Governor of the State of Arizona; Jack LaSota, Jr., Attorney General of the State of Arizona; Bart Fleming, Treasurer of the State of Arizona; Raymond Long, Finance Commissioner of the State of Arizona; Gene Blake, William S. Boice, Jack Montgomery, Keith Walton, Jack McManus, and Milton G. Sanders, individually and as members of the Arizona Agricultural Relations Board; and Theresa Bond, in

her capacity as Executive Secretary of the Arizona[1] Farm Bureau Federation, an Arizona corporation; Arizona Grape Growers Association, an Arizona corporation; and the Yuma Citrus Shipper's Association, an unincorporated association, hereby appeal to the Supreme Court of the United States from the Judgment of this Court in this case entered on April 20, 1978.

This appeal is taken pursuant to 28 U.S.C. §1253.

DATED this 13th day of June, 1978.

Respectfully submitted,

JOHN A. LASOTA, JR.
The Attorney General

By: /s/ Richmond K. Turner
Assistant Attorney General
Attorney for Defendants

JENNINGS, STROUSS & SALMON

By: /s/ Jon L. Kyl
Charles E. Jones
Jon L. Kyl
John B. Weldon, Jr.
Attorneys for Intervenors

[1]Due to an inadvertent typographical error the following line was omitted from the Notice of Appeal: "Agricultural Employment Relations Board; and the Intervenors, the Arizona".

CERTIFICATE OF SERVICE

I, John A. LaSota, Jr., caused to be served a copy of the Notice of Appeal upon counsel for the Plaintiffs, as required by Rule 33 of the U.S. Supreme Court rules, by depositing a copy of said Notice of Appeal in the United States Post Office with first class postage prepaid and addressed to counsel of record for the Plaintiffs at:

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Attorney for Defendants

APPENDIX D

ARTICLE 5. AGRICULTURAL EMPLOYMENT RELATIONS

Article 5, consisting of sections 23-1381 to 23-1395, was added by Laws 1972, Ch. 137, § 1, effective August 13, 1972.

§ 23-1381. *Declaration of policy*

It is hereby declared to be the policy of this state that the uninterrupted production, packing, processing, transporting, and marketing of agricultural products is vital to the public interest. It is also declared to be the policy of this state that agricultural employees shall be free to organize, to take concerted action, and through representatives of their own choosing enter into collective bargaining contracts establishing their wages and terms and conditions of employment; or to refrain from engaging in any or all such activities. It is further declared that there now exists an inequality of bargaining power between agricultural employers and labor unions, arising out of the seasonable character and perishable nature of such agricultural products, the mobility of agricultural labor, and the fundamental differences between agriculture and industry. While the right to strike is a basic right of organized labor, such right must take into account the perishable character and the seasonal nature of agricultural products and must be limited and regulated accordingly. It is the intent of the legislature to provide a means to bargain collectively which is fair and equitable to agricultural employers, labor organizations and employees; to provide orderly election procedures to resolve questions concerning representation of agricultural employees and to declare

that certain acts are unfair labor practices which are prohibited and subject to control by the police power of this state. The overriding special interest of the state of Arizona with respect to certain secondary boycott activities originating in this state, but extending across state lines and directed at employers in other states, must be recognized, and such acts must be made unlawful and subject to control by the police power of this state.

§ 23-1382. *Definitions*

In this article, unless the context otherwise requires:

1. "Agricultural employee, permanent" means any employee over sixteen years of age who has been employed by a particular agricultural employer for at least six months during the preceding calendar year, engaged in the growing or harvesting of agricultural crops or the packing of agricultural crops where packing is accomplished in the field. "Agricultural employee, temporary" means any employee over sixteen years of age who is employed by a particular agricultural employer and who has been so employed during the preceeding calendar year, engaged in the growing or harvesting of agricultural crops or the packing of agricultural crops where packing is accomplished in the field. If otherwise qualified, a person shall be considered an agricultural employee if an agricultural employer pays the wages of the employee for work performed for the employer's benefit or on his behalf, even though the supervision of the employee, the bookkeeping, and the issuance of payroll checks is by a person other than the employer. In calculating a work day of an agricultural employee, one hour or more of employment in any one day shall be considered a work day. "Agricultural employee" also includes any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment. "Agricultural employee" does not include any individual:

(a) Employed by his parent, spouse or by an immediate relative.

(b) Having the status of an independent contractor.

(c) Employed as a supervisor or in a confidential capacity or as a clerical employee or as a guard.

(d) Employed as an executive, professional or technical employee.

(e) Who has quit or has been discharged for cause.

(f) Who is a tenant or a sharecropper and reasonably directs or shares in the management of an enterprise engaged in agriculture.

(g) Engaged in hauling or stitching functions.

2. "Agricultural employer" means any employer engaged in agriculture who employed six or more agricultural employees for a period of thirty days during the preceding six-month period, and includes any person who provides labor and services on one or more farms as an independent contractor if such person, for a period of thirty days during the preceding six-month period, employed six or more employees in such work. In calculating the number of agricultural employees employed by an agricultural employer or provided by an independent contractor, one hour or more of employment in any one day shall be considered a day of

work. "Agricultural employer" also includes any employer, engaged in agriculture with less than six agricultural employees, who voluntarily elects to be subject to this article by filing a request in writing with the board.

3. "Agriculture" means all services performed on a farm as defined and described in § 23-603, including, but not limited to, the recruiting, housing and feeding of persons employed or to be employed as agricultural employees by agricultural employers.

4. "Board" means the agricultural employment relations board.

5. "Farm" means any enterprise engaged in agriculture which is operated from one headquarters where the utilization of labor and equipment is directed and which, if consisting of separate tracts of land, such tracts are located within a fifty mile radius of such headquarters.

6. "Labor dispute" means any controversy between an agricultural employer and his agricultural employees or their representative concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment.

7. "Labor organization" means any organization or any agency defined and described in §§ 23-1301 and 23-1321.

8. "Person" means one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy or receivers.

9. "Professional employee" means:

(a) Any employee engaged in agricultural work that:

(i) Is predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work,

(ii) Involves the consistent exercise of discretion and judgment in its performance,

(iii) Is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time, or

(iv) Requires knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning.

(b) Any employee who has completed the course or courses of specialized intellectual instruction and study described in subdivision (a), item (iv), and is performing such work, or is performing such work or related work under the supervision of a professional person while acquiring such specialized instruction.

10. "Representative" means any individual or labor organization.

11. "Supervisor" means any individual having authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if such authority requires the use of independent judgment.

12. "Ultimate consumer" means the person who purchases an agricultural product for consumption.

13. "Unfair labor practice" means any unfair labor practice listed in § 23-1385.

23-1383. *Rights of employees*

A. Agricultural employees shall have the right to self-organization, to bargain directly for themselves, and to form and join or assist labor organizations to bargain collectively through representatives of their own free choosing, or to engage in lawful concerted activity for the purpose of collective bargaining or other mutual aid or protection, and each such employee shall have the right, without interference from any source, to refrain from any and all of such activities.

B. Agricultural employees shall also have those rights more particularly defined and described in articles 1 and 3 of this chapter, and shall be protected from the practices described in article 4 of this chapter.

§ 23-1384. *Rights of employer*

A. An agricultural employer shall have the following management rights:

1. To manage, control and conduct his operations, including, but not limited to, the number of farms

and their locations, methods of carrying on any operation or practices thereon, kinds of crops, time of work, size and make-up of crews, assignment of work, and places of work.

2. To hire, suspend, discharge or transfer employees in accordance with his judgment of their ability.

3. To determine the type of equipment or machinery to be used, the standards and quality of work, and the wages, hours and conditions of work. The terms of employment relating to wages, hours, conditions of work, and matters of worker safety, sanitation, health and the establishment of grievance procedures directly relating to a job shall be subject to negotiation.

4. To work on his own farm in any capacity at any time.

5. To join or refuse to join any labor organization or employer organization.

§ 23-1385. *Unfair labor practices*

A. It shall be an unfair labor practice for an agricultural employer:

1. To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in § 23-1383 and articles 1 and 3 of this chapter,[1] or to violate the protection of employees from the practices described in article 4 of this chapter.[2]

2. To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. An agricultural employer shall not be prohibited from permitting

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[1]Sections 23-1381 et seq. and 23-1341 et seq.

[2]Section 23-1361.

employees to confer with him during working hours without loss of time or pay.

3. By discrimination in regard to hiring or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

4. To discharge or otherwise discriminate against an agricultural employee because he has filed charges or given testimony under this article.

5. To refuse to bargain collectively with the representatives of his employees, subject to the provisions of § 23-1389. Nothing in this article shall be construed as requiring an agricultural employer to bargain collectively until a representative of his agricultural employees has been determined by means of a valid secret ballot election.

6. To discharge or otherwise discriminate against any person because he has filed charges or given testimony before the board or a court.

7. To threaten to have discharged any agricultural employee, or threaten to have reduced wages of any agricultural employees, solely because of any labor activity.

B. It shall be an unfair labor practice for a labor organization or its agents:

1. To impose any economic sanction or to restrain or coerce agricultural employees in the exercise of their rights or to coerce or intimidate any employee in the enjoyment of his legal rights provided by this article, or to intimidate his family, picket his domicile or injure the person or property of any employee or his family. This paragraph shall not impair the

right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership.

2. To threaten or impose any economic sanction or reprisal against any person not a member of the labor organization in the exercise of rights under this article, including but not limited to the right to refrain from any or all concerted activity, or against any person, not a member thereof, who refrains from compliance with a union rule, policy, or practice which establishes or affects wages, hours, or working conditions at such person's place of employment.

3. To restrain, coerce, or threaten or impose any fine or other economic sanction against any person who invokes the processes of the board, or the court, or against an agricultural employer or employee in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.

4. To refuse to bargain collectively with an agricultural employer, provided it is the majority representative of his agricultural employees as determined pursuant to § 23-1389.

5. To cause or attempt to cause an agricultural employer:

(a) To pay or deliver or agree to pay or deliver any money or other thing of value for services which are not performed or are not to be performed.

(b) To establish or alter the number of employees to be employed or the assignment thereof.

(c) To assign work to the employees of a particular employer.

(d) To discriminate in regard to hiring or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. Nothing in this paragraph shall prohibit agreements between labor organizations and agricultural employers which regulate hiring and tenure of employment on the basis of seniority; provided further that the labor organization is not given power to determine seniority unilaterally.

6. To engage in a secondary boycott as defined in § 23-1321.

7. To induce or encourage or threaten, restrain or coerce any secondary employer or any executive or management employee of any secondary employer to make a management decision not to handle, transport, process, pack, sell or distribute any agricultural commodity of an agricultural employer with whom a labor dispute exists.

8. To induce or encourage the ultimate consumer of any agricultural product to refrain from purchasing, consuming or using such agricultural product by the use of dishonest, untruthful and deceptive publicity. Permissible inducement or encouragement within the meaning of this section means truthful, honest and nondeceptive publicity which identifies the agricultural product produced by an agricultural employer with whom the labor organization has a primary dispute. Permissible inducement or encouragement does not include publicity directed against any trademark, trade name or generic name

which may include agricultural products of another producer or user of such trademark, trade name or generic name.

9. To restrain, coerce or threaten an ultimate consumer to prevent him from purchasing, consuming or using such agricultural product.

10. To threaten or engage in arson, libel, slander, injury to person or property or other violent conduct when the objective is to prevent the preparing for market, transporting, handling, displaying for sale, or selling of any agricultural product.

11. To intimidate, restrain, or coerce agricultural employers in the exercise of the rights guaranteed by § 23-1384.

12. To picket or cause to be picketed, boycott or cause to be boycotted, or threaten to boycott or picket, or cause to be boycotted or picketed, any agricultural employer when the objective is to induce, encourage, force or require an agricultural employer to recognize or bargain with a labor organization as the representative of his agricultural employees, or the agricultural employees of an agricultural employer to accept or select such labor organization as their collective bargaining representative unless such labor organization is currently certified as the representative of such employees:

(a) Where the agricultural employer has lawfully recognized in accordance with this article any other labor organization and a question concerning representation may not appropriately be raised under § 23-1389.

(b) Where within the preceding twelve months a valid election under § 23-1389 has been conducted.

(c) Where a petition has been filed under § 23-1389.

13. To call a strike unless a majority of the employees within the bargaining unit has first approved the calling of such a strike by secret ballot.

C. The expressing of any views, argument, opinion or the making of any statement, including expressions intended to influence the outcome of an organizing campaign, a bargaining controversy, a strike, lockout or other labor dispute, or the dissemination of such views whether in written, printed, graphic, visual or auditory form, if such expression contains no threat of reprisal or force or promise of benefit, shall not constitute or be evidence of an unfair labor practice or constitute grounds for, or evidence justifying, setting aside the results of any election conducted under any of the provisions of this article. A statement of fact by either a labor organization or an agricultural employer relating to existing or proposed operations of the employer or to existing or proposed terms, tenure, or conditions of employment with the employer shall not be considered to constitute a threat of reprisal or force or promise of benefit. No employer shall be required to furnish or make available to a labor organization, and no labor organization shall be required to furnish or make available to an employer, materials, information, time, or facilities to enable such employer or labor

organization, as the case may be, to communicate with employees of the employer, members of the labor organization, its supporters, or adherents.

D. For the purposes of this section, to "bargain collectively" is the performance of the mutual obligation of the agricultural employer and the representative of the agricultural employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment which directly affect the work of employees, or the negotiation of an agreement, or to resolve any question arising thereunder. To "bargain collectively" includes the furnishing of necessary and relevant information in connection with the negotiation of an agreement or any issue arising under such agreement, or requiring as a condition for entering into an agreement the execution of a written contract incorporating any agreement reached if requested by either party. The failure or refusal of either party to agree to a proposal, or to the making, changing or withdrawing of a lawful proposal, or the making of a concession shall not constitute, or be evidence, direct or indirect, of a breach of this obligation. The board in any remedial order shall not direct either party to make any concession or agree to any proposal or to make any payment of money except to employees who are reinstated with back pay as provided in § 23-1390. This section shall not require any agricultural employer to bargain collectively with respect to any management rights. "Management rights", as used in this subsection, include but are not limited to the right to discontinue the entire farming operation or any part thereof, to contract out any part of the work thereof not covered

by a labor contract, to sell or lease any of the real or personal property involved therein, or to determine the methods, equipment and facilities to be used in producing agricultural products or the agricultural products to be produced.

E. Where there is in effect a collective bargaining contract covering agricultural employees, the duty to bargain collectively also means that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification:

1. Serves a written notice upon the other party to the contract of the proposed termination or modification not less than sixty days prior to the expiration date thereof, or if such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification.

2. Offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications.

3. Continues the contract in full force and effect without resorting to a strike or lockout for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

F. The duties imposed upon agricultural employers, agricultural employees, and labor organizations shall become inapplicable upon an intervening certification of the board, under which the labor organization or individual which is a party to the contract has been superseded as or ceased to be the representative of the employees subject to the provisions of § 23-1389, and

the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any agricultural employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an agricultural employee of the agricultural employer engaged in the particular labor dispute for the purposes of §§ 23-1385, 23-1389 and 23-1390, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

§ 23-1386. *Agricultural employment relations board; members; terms; appointment*

A. There is established an agricultural employment relations board which consists of seven members.

B. The members of the board shall be appointed by the governor. Two of the members shall be appointed as representatives of agriculture employers, two of the members appointed shall be representatives of organized agricultural labor and the three additional members, one of whom shall be the chairman of the board, shall be appointed as representatives of the general public. The term of office of the members shall be five years. Upon the initial appointment, one of the labor representatives shall be appointed for a term of one year, one of the representatives of the general public shall be appointed for a term of one year, one of the agricultural representatives shall be appointed for a term of two years, one of the representatives of the general public shall be appointed for a term of two years, one of the agricultural representatives shall be

appointed for a term of three years, one of the labor representatives shall be appointed for a term of four years and one of the public members of the board shall be appointed for a term of five years. Any individual appointed to fill a vacancy of any member shall be appointed only for the unexpired portion of the term of the member he is succeeding. Members of the board may be removed from office by the governor upon notice and hearing for neglect of duty or malfeasance in office, but for no other cause.

C. Two alternate members shall be appointed to the board by the governor. One of the alternates shall be appointed as a representative of organized agricultural labor and the other as a representative of agriculture. Alternates shall be appointed for terms of five years. Any individual appointed to fill a vacancy of any alternate shall be appointed only for the unexpired portion of the term of the alternate he is succeeding. Alternates may be removed from office by the governor upon notice and hearing for neglect of duty or malfeasance in office, but for no other cause. No alternate shall participate in deliberations of the board except in the absence of a board member representing his area of interest.

D. There shall be a general counsel of the board who shall be appointed by the governor. The general counsel shall be the exclusive legal representative of the board, shall have final authority, on behalf of the board, with respect to the investigation of charges and the issuance of complaints under § 23-1390 and with respect to the prosecution of such complaints by the board, and shall have such other duties as the board may prescribe or as may be provided by law. The general counsel shall appoint such assistants as shall be needed to carry out the work of the office.

E. A vacancy on the board shall not impair the right of the remaining members to exercise all of the powers of the board and four members shall at all times constitute a quorum of the board. The board shall have an official seal which shall be judicially recognized.

F. The principal office of the board shall be in the city of Phoenix, but it may meet and exercise any or all of its powers at any other place.

G. The board may meet in executive session upon the decision of a majority of the members of the board.

H. Meetings of the board may be called by the chairman or by a majority of the members of the board by giving written notice to the chairman who shall notify all the members of the board as to time and place of the board meeting.

§ 23-1387. *Powers and duties*

A. The board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the state. A member of the board who participates in any such inquiry shall not be disqualified from subsequently participating in a decision of the board in the same case.

B. The board shall make and may from time to time amend and rescind, in the manner prescribed by law, such rules and regulations as may be necessary to carry out the provisions of this article.

C. The board may also establish offices in such other cities as it shall deem necessary and shall determine the region to be served by such offices. The board may delegate to the heads of these offices as it deems appropriate its powers under § 23-1389, to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, to determine whether a question of representation exists and to direct an election by a secret ballot and certify the results of such election within ten days. The board may review any action taken pursuant to the authority delegated under this subsection by any regional officer upon a request for a review of such action filed with the board by any interested party. Any such review made by the board shall not, unless specifically ordered by the board, operate as a stay of any action taken by the regional officer. The entire record considered by the board in considering or acting upon any such request or review shall be made available to all parties prior to such consideration or action, and the board's findings and action thereon shall be published as a decision of the board.

§ 23-1388. *Officers and employees of the board*

A. The board shall have authority to appoint an executive secretary and such attorneys, hearing officers, trial examiners and other employees as it may from time to time find necessary for the proper performance of its duties. Compensation for all such personnel shall be as determined pursuant to § 38-611.

B. The board may not employ any attorney for the purpose of reviewing transcripts of hearings or preparing drafts of opinions, except that any attorney employed for assignment as a legal assistant to any

board member may for such board member review such transcripts and prepare such drafts.

C. No trial examiner's report shall be reviewed, either before or after its publication, by any person other than a member of the board or his legal assistant, and no trial examiner shall advise or consult with the board with respect to exceptions taken to his findings, rulings or recommendations.

D. Attorneys appointed under this section may, at the discretion of the board, appear for and represent the board in any case in court.

§ 23-1389. *Representatives and elections*

A. Representatives selected by a secret ballot for the purposes of collective bargaining by the majority of the agricultural employees in a unit appropriate for such purposes shall be the exclusive representatives of all the agricultural employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment. If ratification of any such contract is required, the right to vote in such ratification shall be limited to the employees in the bargaining unit. Any individual agricultural employee or a group of agricultural employees may at any time present grievances to their agricultural employer and have such grievances adjusted, without the intervention of the bargaining representative, if the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect. The bargaining representative shall be given opportunity to be present at such adjustment.

B. The board shall decide in each case whether in order to ensure to employees the fullest freedom in exercising their rights the unit appropriate for the purposes of collective bargaining shall consist of either all temporary agricultural employees or all permanent agricultural employees of an agricultural employer working at the farm where such employer grows or produces agricultural products or both. In making unit determinations the extent of a union's extent of organization shall not be controlling. Principal factors should be the community of interest between employees, same hours, duties and compensation, the administrative structure of the employer and control of labor relations policies.

C. The board shall investigate any petition, and if it has reasonable cause to believe that a question of representation exists shall provide for an appropriate hearing upon due notice, when such petition has been filed in good faith in accordance with such regulations as may be prescribed by the board:

1. By an agricultural employee or group of agricultural employees or any individual or labor organization acting in their behalf alleging that thirty per cent or more of the number of agricultural employees in the unit in question either wish to be represented for collective bargaining and that their employer declines to recognize their representative or assert that the individual or labor organization which has been certified or is being currently recognized by their employer as the bargaining representative is no longer a representative.

2. By an agricultural employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative or that an individual or labor organization which has previously been certified as the bargaining representative is no longer a representative.

D. If the board finds upon the record of such hearing that a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof. If a second labor organization files a petition for an election alleging that thirty per cent or more of the employees in the unit in question desire to be represented by that labor organization, then the board shall require that the names of both labor organizations shall appear on the ballot. In any election the voters shall be afforded the choice of "no union". If in a representational election where more than one union is on the ballot, and none of the choices receives a majority vote, a second election shall be held. The second election shall be between the union receiving the highest number of votes and "no union". In any election a labor organization shall obtain a majority of all votes cast in that election in order to be certified as the bargaining representative of all the employees in that unit.

E. In determining whether or not a question of representation exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought. In no case shall the board deny a labor organization a

place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with § 23-1390.

F. Within five days of receipt of such a petition, the agricultural employer may file a challenge to such petition on the ground that the authorization for the filing of such petition is not current or that such authorization has been obtained by fraud, misrepresentation or coercion. Such petition shall not act to stay the election proceeding but if it is thereafter determined that the authorizations are not current or obtained by fraud, misrepresentation or coercion the petition will be dismissed.

G. No election shall be directed or conducted in any bargaining unit or any subdivision thereof within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the board shall find are consistent with the purposes and provisions of this article in any election conducted within three months after the commencement of the strike. Any agricultural employee who is found to have sought or accepted employment only for the purpose of affecting the outcome of an election shall not be eligible to vote in an election conducted pursuant to the provisions of this article for a period of twelve months from the date of that election.

H. Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the board.

I. The agricultural employer, within ten days after an election is directed by the board or a consent election agreement is approved by the board and on request of the board, shall furnish to the board a list of agricultural employees in the bargaining unit who are qualified to vote, and such a list shall be made available to the organizations or other interested employees involved in the election.

J. Upon the filing with the board, by thirty per cent or more of the agricultural employees in a bargaining unit covered by a certification or by an agreement between their employer and a labor organization made pursuant to § 23-1385, of a petition alleging the desire that such representation authority be rescinded, the board shall conduct an election by secret ballot of the employees in such unit and certify the results thereof to the labor organization and to the employer.

§ 23-1390. *Prevention of unfair labor practices*

A. The board may, as provided in this section, prevent any person from engaging in any unfair labor practice.

B. When it is charged that any person has engaged in or is engaging in any such unfair labor practice, the board, or any agent or agency designated by the board for such purposes, may issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of such complaint. No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the board and the service of a copy

thereof upon the person against whom such charge is made, unless the person so aggrieved was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the board or the member, agent, or agency conducting the hearing, any other person may be allowed to intervene in the proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the superior courts of the state under the rules of civil procedure applicable to such courts. All proceedings shall be reported by a phonographic or magnetic tape recorder.

C. The testimony taken by the board or such member, agent, or agency shall be reduced to writing and filed with the board. Thereafter, in its discretion, the board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the board determines that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, the board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take

such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this article. Where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him. Such order may further require such person to make reports from time to time showing the extent to which he has complied with the order. If upon the preponderance of the testimony taken the board determines that the person named in the complaint has not engaged in or is not engaging in any such unfair labor practice, then the board shall state its findings of fact and shall issue an order dismissing the complaint. No order of the board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. If the evidence is presented before a member of the board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceedings a proposed report, together with a recommended order, which shall be filed with the board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the board may authorize, such recommended order shall become the order of the board and become effective as therein prescribed.

D. Until the record in a case is filed in a court, as provided in this section, the board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any findings or order made or issued by it.

E. The board may petition any superior court in any county wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order. Upon the filing of such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and may grant such temporary relief or restraining order as it deems just and proper, and may make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the board. An objection that has not been urged before the board, or a member, agent or agency thereof, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the board, or a member, agent, or agency thereof, the court may order such additional evidence to be taken before the

board, its member, agent, or agency, and to be made a part of the record. The board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact is supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review as provided by law.

F. Any person aggrieved by a final order of the board granting or denying in whole or in part the relief sought may obtain a review of such order in any superior court in the county wherein the unfair labor practice in question was alleged to have been engaged in by filing in such court a written petition praying that the order of the board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the board. Upon the filing of such petition the court shall proceed in the same manner as in the case of an application by the board under subsection E of this section, and shall have the same jurisdiction to grant to the board such temporary relief or restraining order as its deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the board. The

findings of the board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

G. When an order of the board made pursuant to this section is based in whole or in part upon facts certified following an investigation pursuant to § 23-1389, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection E or F of this section, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript. The court shall not enforce any order of the board which rests, in whole or in part, upon evidence adduced from witnesses who have not testified under oath and who have not been subject to cross-examination by opposing parties.

H. The commencement of proceedings under subsection E or F of this section shall not, unless specifically ordered by the court, operate as a stay of the board's order.

I. Petitions filed under this article shall be heard expeditiously, and if possible within ten days after they have been docketed.

J. The board may, upon issuance of a complaint as provided in subsection B charging that any person has engaged in or is engaging in an unfair labor practice, petition the superior court in any county wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts

business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the board such temporary relief or restraining order as it deems just and proper.

K. When it is charged that any person has engaged in an unfair labor practice, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the board, petition the superior court in the county wherein the unfair labor practice in question has occurred, is alleged to have occurred, or wherein the person alleged to have committed the unfair labor practice resides or transacts business, for appropriate injunctive relief pending the final adjudication of the board with respect to such matter. Upon the filing of any such petition the superior court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law, provided that no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon the filing of any such petition the courts shall cause notice thereof to be

served upon any person complained against in the charge and such person, including the charging party, shall be given an opportunity to appear in person or by counsel and present any relevant testimony. For the purposes of this subsection, superior court shall be deemed to have jurisdiction of a labor organization either in the county in which such organization maintains its principal office, or in any county in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit.

§ 23-1391. *Investigatory powers*

A. The board, or its duly authorized agent or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy, any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The board, or any member thereof, shall upon application of any party to such proceedings forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the board to revoke, and the board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings,

or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required. Any member of the board, or any agent or agency designated by the board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the state of Arizona, at any designated place of hearing.

B. In case of contumacy or refusal to obey a subpoena issued to any person, the superior court of the county within the jurisdiction of which the person guilty of contumacy or refusal to obey is found or resides or transacts business shall, upon application by the board, have jurisdiction to issue to such person an order requiring such person to appear before the board, or a member, agent or agency thereof, to produce evidence if so ordered, or to give testimony touching the matter under investigation or in question. Failure to obey such order of the court may be punished by the court as contempt.

C. No person shall be excused from attending and testifying or from producing books, records, correspondence, documents or other evidence in obedience to the subpoena of the board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. No individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be

exempt from prosecution and punishment for perjury committed in so testifying.

D. Complaints, orders and other process and papers of the board, or a member, agent, or agency thereof, may be served either personally, by registered or certified mail, by telegraph or by leaving a copy thereof at the principal office, place of business or residence of the person required to be served. The verified return by the individual personally serving or leaving the copy, setting forth the manner of such service, and the return post office receipt or telegraph receipt therefor, when registered or certified, and mailed or telegraphed as provided in this subsection, shall be proof of service. Witnesses summoned before the board, its members, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the superior courts and witnesses whose depositions are taken and the persons taking the depositions shall severally be entitled to the same fees as are paid for like services in the superior courts.

E. The departments and agencies of the state, when directed by the governor, shall furnish the board, upon its request, all unprivileged records, papers and information in their possession relating to any matter before the board.

§ 23-1392. *Penalties*

Any person who wilfully resists, prevents, impedes or interferes with any member of the board or any of its agents or agencies in the performance of duties pursuant to this article, or who violates any provision of this article is guilty of a misdemeanor punishable by a fine of not more than five thousand dollars, by imprisonment for not more than one year, or both.

Provided, however, that none of the provisions of this section shall apply to any activities carried on outside the state of Arizona.

§ 23-1393. *Court jurisdiction*

A. Any person who is aggrieved or is injured in his business or property by reason of any violation of this article, or violation of an injunction issued as provided in this section, may sue in any superior court having jurisdiction of the parties for recovery of any damages resulting from such unlawful action, regardless of where such unlawful action occurred and regardless of where such damage occurred, including costs of the suit and reasonable attorney fees. Upon the filing of such suit the court shall also have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper. Petitions for injunctive relief or temporary restraining orders shall be heard expeditiously. Petitions for temporary restraining orders alleging a violation of § 23-1385 shall be heard forthwith and if the petition alleges that substantial and irreparable injury to the petitioner is unavoidable such temporary restraining orders may be issued pursuant to Rule 65 of the Arizona Rules of Civil Procedure.

B. In the case of a strike or boycott, or threat of a strike or boycott, against an agricultural employer, the court may grant, and upon proper application shall grant as provided in this section, a ten-day restraining order enjoining such a strike or boycott, provided that if an agricultural employer invokes the court's jurisdiction to issue the ten-day restraining order to enjoin a strike as provided by this subsection, said employer must as a condition thereto agree to submit the dispute to binding arbitration as the means of settling the

unresolved issues. In the event the parties cannot agree on an arbitrator within two days after the court awards a restraining order, the court shall appoint one to decide the unresolved issues. Any agricultural employer shall be entitled to injunctive relief accorded by Rule 65 of the Arizona Rules of Civil Procedure upon the filing of a verified petition showing that his agricultural employees are unlawfully on strike or are unlawfully conducting a boycott, or are unlawfully threatening to strike or boycott, and that the resulting cessation of work or conduct of a boycott will result in the prevention of production or the loss, spoilage, deterioration, or reduction in grade, quality or marketability of an agricultural commodity or commodities for human consumption in commercial quantities. For the purpose of this subsection, an agricultural commodity or commodities for human consumption with a market value of five thousand dollars or more shall constitute commercial quantities.

C. For the purpose of this article, superior courts shall have jurisdiction of a labor organization in this state if such organization maintains its principal office in this state, or if its duly authorized officers or agents are engaged in promoting or protecting the interests of agricultural employee members or in the solicitation of such prospective members in this state.

D. The service of summons, subpoena, or other legal process of any superior court upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

E. Any labor organization which represents employees as defined in this article, and any agricultural employer, shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of this state.

F. For the purposes of this article, in determining whether any person is acting as an agent of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. Nothing in this section shall be deemed to preclude an agent being sued both in his capacity as an agent and as an individual.

§ 23-1394. *Scope of article*

The provisions of this article shall apply only to such persons, labor organizations or activities as are not within the jurisdiction of the National Labor Relations Act[3] or the jurisdictional guidelines established by the national labor relations board.

§ 23-1395. *Limitations*

A. Nothing in this article, except as otherwise specifically provided, shall be so construed as to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

B. Nothing in this article shall prohibit any individual employed as a supervisor from becoming or

[3] 29 U.S.C.A. § 151 et seq.

remaining a member of a labor organization, but no employer subject to this article shall be compelled to deem such supervisors as agricultural employees for the purpose of any law, either national or local, relating to collective bargaining.